Supreme Court, U. S.
FILED
OCT 1 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court
of the United States

OCTOBER TERM, 1975

No. 74-1274

ABBOTT LABORATORIES, et al.,

Petitioners,

v.

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., etc.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 10, 1975
CERTIORARI GRANTED JUNE 23, 1975

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-75

In the Supreme Court
of the United States

OCTOBER TERM, 1975

No. 74-1274

ABBOTT LABORATORIES, et al.,

Petitioners,

v.

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., etc.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INDEX

*Relevant Docket Entries	1
Supplemental Order	15
*Amended Complaint	16
Plaintiff's Certificate and Statement	29
Exhibit D	36
Exhibit G	39
Exhibit A to Plaintiff's Supplement to Certificate and Statement	42
*Affirmative Defenses in Defendants' Answers Based on 15 U.S.C. § 13c	49

* Starred items are those designated by petitioners. The balance were designated by respondent.

INDEX (Cont.)

Order of October 30, 1972 58

Plaintiff's Second Supplemental Certificate and Statement 58

Plaintiff's Motion re Limited Discovery and Brief in Support of Motion 59

Affidavit of Raymond L. Montee re Hospital Drug Purchases 61

Plaintiff's Notice, Under Protest, re Second Cause of Action "Discovery" 65

*Motion for Summary Judgment on Second Cause of Action 68

Plaintiff's Rule 56 Affidavit in Opposition to Defendants' Motion for Summary Judgment on the Second Cause of Action 69

Exhibit A 133

Rule 56 Affidavit of Logan Wallace, President of Plaintiff, in Opposition to Defendants' Motion for Partial Summary Judgment on the Second Cause of Action 143

Rule 56 Affidavit of Howard Steinbach in Opposition to Defendants' Motion for Summary Judgment on the Second Cause of Action 146

Plaintiff's Rule 56 Affidavit re Audit Documents of Alleged "Nonprofit" Hospitals 170

Plaintiff's Objection to "Use" or "Destination" Testimony re Defendants' Motion for Summary Judgment on Second Cause of Action, and Brief in Support of Objection 174

Exhibit C 207

Rule 56 Affidavit of Stanley E. Hartman in Opposition to Defendants' Motion for Summary Judgment on the Second Cause of Action 212

INDEX (Cont.)

Plaintiff's Rule 56 Affidavit of Raymond L. Montee re "Charitable" Nature of Bess Kaiser Hospital, Portland, Ore. 229

Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment on the Second Cause of Action 231

Exhibit A 240

Second Rule 56 Affidavit of Stanley Hartman in Opposition to Defendants' Motion for Summary Judgment on the Second Cause of Action, re Preferential Drug Prices of Listed Defendants 253

Order of May 4, 1973 261

Affidavit of Stanley Hartman filed May 18, 1973 263

Third Rule 56 Affidavit of Howard Steinbach in Opposition to Defendants' Motion for Summary Judgment on the Second Cause of Action 266

Fourth Rule 56 Affidavit of Stanley Hartman in Opposition to Defendants' Motion for Summary Judgment on Plaintiff's Second Cause of Action, re Drug Price Overcharges by Bess Kaiser Hospital, an Alleged "Non-profit" Hospital 268

Plaintiff's Objection to Hospital Witness "Estimates" of "Walk-in" Drug Sales to Members of Public, and Brief in Support of Objection 273

*Oral Opinion of the District Court, May 25, 1973 278

*Order and Partial Summary Judgment 290

Affidavit of Henry Kane re William H. Rorer, Inc. "In-Hospital Use Only" Drug Container and Notice of Deposit of Said Exhibit with the Clerk of the Court 293

INDEX (Cont.)

Patricia Neuberger Affidavit re Emanuel Hospital Drug Prescription 296

Stanley Hartman Affidavit re Diversion of Drug 298

Fifth Rule 56 Affidavit of Stanley Hartman in Opposition to Defendants' Motion for Summary Judgment on the Second Cause of Action, re Evidence of Drug Sales to Non-Hospitalized Purchasers, and Notice of Deposit of Prescription Drug Containers Exhibit with Clerk of the Court 300

*Opinion of the Court of Appeals for the Ninth Circuit 305

*Order Denying Rehearing 316

*Order Granting Petition for Writ of Certiorari 318

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civ. No. 71-543

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., an Oregon non-profit corporation, on behalf of its assignors and all others similarly situated in the State of Oregon,

Plaintiff,

v.

ABBOTT LABORATORIES, an Illinois corporation; AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation; BRISTOL-MYERS COMPANY, a Delaware corporation; CARTER-WALLACE, INC., a Delaware corporation; ELI LILLY AND COMPANY, an Indiana corporation; ENDO LABORATORIES, INC., a Delaware corporation; ORTHO PHARMACEUTICAL CORPORATION, a New Jersey corporation; SQUIBB CORPORATION, a Delaware corporation; E. R. SQUIBB & SONS, INC., a Delaware corporation; A. H. ROBINS COMPANY, INC., a Virginia corporation; WILLIAM H. RORER, INC., a Pennsylvania corporation; and WARNER-LAMBERT PHARMACEUTICAL COMPANY, a Delaware corporation,

Defendants.

RELEVANT DOCKET ENTRIES

August 6, 1971	Filed class action complaint for damages and injunctive relief under the antitrust laws; jury trial requested.

August 6, 1971	Filed plaintiff's interrogatories to defendants (first set).
August 9, 1971	Issued summons to marshal.
October 28, 1971	Filed return of service of summons on all defendants.
November 22, 1971	Filed amended complaint for damages and injunctive relief under the antitrust laws; jury trial requested.
November 23, 1971	Filed plaintiff's amended interrogatories to defendants (first set).
December 22, 1971	Filed request for admissions.
December 22, 1971	Filed defendants' motions (1) to dismiss third and fourth causes of action; (2) to limit discovery and for summary judgment as to the second cause of action; (3) to limit discovery and for summary judgment as to the fifth cause of action.
January 10, 1972	Filed notice of deposition of Warren Kobelin.
January 12, 1972	Filed motion to defer deposition of Warren Kobelin with memorandum in support of motion attached.
January 28, 1972	Filed plaintiff's certificate and statement.
February 18, 1972	Filed plaintiff's supplement to certificate and statement.

September 11, 1972	Filed plaintiff's brief in support of plaintiff's certificates and statements.
September 13, 1972	Filed plaintiff's designation of hospital pharmacies.
October 3, 1972	Filed affidavit of Stanley Hartman re Emanuel Hospital drug distribution.
October 4, 1972	Filed answer of defendant Endo Laboratories, Inc. to amended complaint.
October 4, 1972	Filed answer of defendant American Home Products Corporation to amended complaint.
October 4, 1972	Filed answer of defendant E. R. Squibb & Sons, Inc. to amended complaint.
October 4, 1972	Filed answer of defendant Squibb Corporation to amended complaint.
October 4, 1972	Filed answer of defendant Eli Lilly and Company to amended complaint.
October 5, 1972	Filed answer of defendant Bristol-Myers Company to amended complaint.
October 5, 1972	Filed answer of defendant A. H. Robins Co., Inc. to plaintiff's amended complaint.
October 5, 1972	Filed answer of defendant Abbott Laboratories.

October 5, 1972	Filed answer of defendant William H. Rorer, Inc. to amended complaint.
October 5, 1972	Filed answer of Carter-Wallace, Inc. to amended complaint.
October 5, 1972	Filed answer of Warner-Lambert Company to amended complaint.
October 5, 1972	Filed answer of Ortho Pharmaceutical Co. to amended complaint.
October 5, 1972	Record of hearing on question of further discovery re second cause of action.
October 6, 1972	Filed plaintiff's motion to prohibit destruction of documents and brief in support.
October 26, 1972	Filed plaintiff's motion for leave to file and serve Rule 34 request for documents and brief and affidavit in support of motion.
October 30, 1972	Filed order that plaintiff's motion to prohibit destruction of documents by defendants is denied.
November 13, 1972	Filed plaintiff's notice of filing of sealed exhibits.
November 16, 1972	Filed plaintiff's exhibits—certified copies of judgment granting preemptory writ of mandamus and findings of fact and conclusions of law, *A. H. Robins Company, Inc.* v. *Human Relations Agency of the State of California.*

November 27, 1972	Filed consent order that plaintiff's assignors and defendants shall exercise good faith and their best efforts to preserve certain described documents.
November 27, 1972	Filed affidavit of Henry Kane re Kaiser Hospital, an alleged "non-profit hospital."
November 27, 1972	Hearing on motion for leave to file and serve Rule 34 request for documents; order denying motion.
December 4, 1972	Filed plaintiff's second supplemental certificate and statement.
December 29, 1972	Filed plaintiff's motion for discovery and brief in support of motion.
January 2, 1973	Filed affidavit of Logan Wallace re refilling of private doctor's office prescription by Emanuel Hospital pharmacy.
February 5, 1973	Filed affidavit of Raymond L. Montee re hospital drug purchases.
February 5, 1973	Filed plaintiff's motion re limited discovery and brief in support of motion.

February 8, 1973	Filed plaintiff's motion for second cause of action discovery and brief in support of motion.
February 8, 1973	Filed affidavit of Logan Wallace re refilling of private doctor's office prescription by Portland Adventist Hospital.
February 15, 1973	Filed plaintiff's motion for order requiring answers to interrogatories or in the alternative for an order striking defendants' pleadings and for default, and memorandum.
February 26, 1973	Filed Eileen Cummins affidavit re Retail Clerks Union, Local 1092, prescription drug purchases from Kaiser Hospital and related clinic pharmacies and Willamette Community Hospital.
February 27, 1973	Filed plaintiff's excerpts from defendant A. H. Robins Company, Inc. testimony re drug price and practice discrimination against community pharmacies.
February 27, 1973	Filed motion and brief in support of motion re taking depositions of officers, employees, etc. of defendants concerning drug distribution practices.
March 12, 1973	Filed plaintiff's notice under protest re second cause of action "discovery."

March 12, 1973	Filed defendants' motion for summary judgment on second cause of action.
March 12, 1973	Filed defendants' memorandum of points and authorities in support of motion for summary judgment on plaintiff's second cause of action.
March 13, 1973	Filed Rule 56 affidavit of Henry Kane disputing accuracy of charts defendants submitted to court.
March 13, 1973	Filed exhibit to defendants' memorandum of points and authorities in support of motion for summary judgment on plaintiff's second cause of action.
March 20, 1973	Filed plaintiff's Rule 56 affidavit in opposition to defendants' motion for summary judgment on the second cause of action.
March 20, 1973	Filed plaintiff's memorandum re plaintiff's Rule 56 affidavit in opposition to defendants' motion for summary judgment on the second cause of action.
March 21, 1973	Filed Rule 56 affidavit of Roger Tilbury in opposition to defendants' motion for summary judgment on the second cause of action.

March 21, 1973	Filed exhibit to defendants' motion for summary judgment on second cause of action.
March 22, 1973	Filed defendant A. H. Robins Company, Inc. documents pertaining to second cause of action.
March 22, 1973	Filed plaintiff's Rule 56 affidavit disputing accuracy of exhibit to defendants' motion for summary judgment on the second cause of action.
March 22, 1973	Filed Rule 56 affidavit of Logan Wallace, president of plaintiff, in opposition to defendants' motion for partial summary judgment on the second cause of action.
March 28, 1973	Filed Rule 56 affidavit of Howard Steinbach in opposition to defendants' motion for summary judgment on the second cause of action.
April 3, 1973	Filed plaintiff's Rule 56 affidavit re audit documents of alleged "nonprofit" hospitals.
April 6, 1973	Filed plaintiff's objection to use or destination testimony re defendants' motion for summary judgment on second cause of action and brief in support of objection.

April 6, 1973	Filed defendants' motion to strike plaintiff's Rule 56 affidavits in opposition to defendants' motion for summary judgment on the second cause of action.
April 10, 1973	Filed Rule 56 affidavit of Stanley E. Hartman in opposition to defendants' motion for summary judgment on the second cause of action.
April 10, 1973	Filed plaintiff's brief in opposition to defendants' motion to strike plaintiff's Rule 56 affidavit in opposition to defendants' motion for summary judgment on the second cause of action.
April 10, 1973	Filed Rule 56 affidavit of Henry Kane re "personal knowledge" of matters in prior Rule 56 affidavits.
April 10, 1973	Filed second Rule 56 affidavit of Logan Wallace, president of plaintiff, in opposition to defendants' motion for summary judgment on the second cause of action.
April 10, 1973	Filed second Rule 56 affidavit of Howard Steinbach in opposition to defendants' motion for summary judgment on the second cause of action.

April 16, 1973	Filed plaintiff's brief in opposition to defendants' motion for summary judgment on the second cause of action.
April 16, 1973	Filed plaintiff's Rule 56 affidavit of Raymond L. Montee re "charitable" nature of Bess Kaiser Hospital, Portland, Oregon.
April 18, 1973	Filed transcript of proceedings, dated January 8, 1973.
April 23, 1973	Filed second Rule 56 affidavit of Stanley Hartman in opposition to defendants' motion for summary judgment on the second cause of action, re preferential drug prices of listed defendants.
April 24, 1973	Filed affidavit of Henry Kane re Bess Kaiser Hospital, an alleged "nonprofit" hospital.
April 25, 1973	Filed Rule 56 affidavit of Henry Kane in opposition to defendants' motion for summary judgment on second cause of action, re drug sales to public and others by 14 alleged "nonprofit" hospitals.
May 18, 1973	Filed third Rule 56 affidavit of Stanley Hartman in opposition to defendants' motion for summary judgment on the second cause of action, re evidence of drug sales to non-hospitalized

	purchasers, and notice of deposit of prescription drug containers exhibit with clerk of the court.
May 18, 1973	Filed prescription drug containers exhibit identified in above affidavit.
May 18, 1973	Filed defendants' reply memorandum in support of motion for summary judgment.
May 22, 1973	Filed third Rule 56 affidavit of Howard Steinbach in opposition to defendants' motion for summary judgment on the second cause of action.
May 23, 1973	Filed plaintiff's objection to hospital witness "estimates" of "walk-in" drug sales to members of public, and brief in support of objection.
May 23, 1973	Filed fourth Rule 56 affidavit of Stanley Hartman in opposition to defendants' motion for summary judgment on plaintiff's second cause of action, re drug price overcharges by Bess Kaiser Hospital, and alleged "nonprofit" hospital.
May 24, 1973	Filed plaintiff's second brief in opposition to defendants' motion for summary judgment on the second cause of action.
May 25, 1973	Hearing on defendants' motion for summary judgment; order

admitting all physical exhibits tendered with affidavits; order granting defendants' motion for summary judgment on second cause of action; plaintiff's objections to summary judgment denied; defendants' motion to strike certain affidavits—order granting and denying in part. Order denying plaintiff's motions for additional discovery previously filed.

June 5, 1973 — Filed plaintiff's motion for reconsideration, brief in support of motion, and Rule 56 affidavit of Stanley Hartman in support of motion.

June 8, 1973 — Filed defendants' response to plaintiff's motion for discovery.

June 11, 1973 — Filed plaintiff's reply brief in support of motion for order permitting commencement of discovery.

June 22, 1973 — Filed order and partial summary judgment: (1) third and fourth causes of action of amended complaint are dismissed for failure to state claims upon which relief can be granted; (2) summary judgment is hereby entered in favor of defendants on the second cause of action of amended complaint; (3) court is of opinion that this

order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

June 22, 1973 — Filed order re stipulation as to certain evidence, affidavits, etc. accepted for purposes of consideration of defendants' motion for summary judgment.

June 27, 1973 — Filed transcript of proceedings dated October 24, 1972.

June 27, 1973 — Filed transcript of proceedings dated October 5, 1972.

June 27, 1973 — Filed transcript of proceedings dated September 11, 1972; October 5, 1972; October 11, 1972; October 24, 1972; November 27, 1972; and February 5, 1973.

July 2, 1973 — Plaintiff's application for permission to appeal pursuant to 28 U.S.C. § 1292(b) received by Court of Appeals.

July 23, 1973 — Order entered granting plaintiff permisison to take interlocutory appeal from the order of district court granting summary judgment on second cause of action.

July 31, 1973	Filed affidavit of Henry Kane re William H. Rorer, Inc. "In-Hospital Use Only" drug container and notice of deposit of said exhibit with court clerk.
August 3, 1973	Plaintiff's designation of record filed.
August 9, 1973	Defendants' cross-designation of record filed.
September 10, 1973	Plaintiff's supplemental designation of record filed.
October 2, 1973	Excerpt of October 5, 1972 proceedings filed.
October 4, 1973	Excerpt of May 25, 1972 proceedings filed.
October 4, 1973	Filed transcript of proceedings dated May 25, 1973.
October 9, 1973	Record on appeal filed.
December 26, 1974	Opinion and judgment of the Court of Appeals for the Ninth Circuit.
March 11, 1975	Order entered denying petition for rehearing.
June 23, 1975	Order entered granting writ of certiorari.

[R. 49]

United States District Court for the District of Oregon

SUPPLEMENTAL ORDER

(Filed September 29, 1971; caption omitted in printing)

This order supplements the order dated September 24, 1971. After reviewing the transcript of the proceedings, I find that the September 24th order does not include two items.

IT IS ORDERED:

1. Until the court has determined that this case may proceed as a class action, answers to plaintiff's first set of interrogatories are deferred except those interrogatories which are directed to the class action issue.

2. The defendants will not be required to file an answer to the complaint until November 15, 1971.

Dated this 29th day of September, 1971.

(Subscription omitted in printing)

[R. 52]

United States District Court for the District of Oregon

AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER THE ANTITRUST LAWS; JURY TRIAL REQUESTED

(Filed November 21, 1971; caption omitted in printing)

FIRST CAUSE OF ACTION

Plaintiff files this amended complaint on behalf of its assignors and, requesting trial by jury, alleges as follows:

JURISDICTION AND VENUE

1. Jurisdiction and venue are founded upon the Clayton Act (38 Stat. 730, Oct. 15, 1914, Ch. 323, Title 15 U.S.C. § 13 et seq.) as amended by the Robinson-Patman Act (June 19, 1936, Ch. 592, 49 Stat. 1526) and other amendments, and upon the Sherman Act (July 2, 1890,

[R. 53]

Ch 647, 26 Stat. 209), 15 U.S. C. § 1 et seq., and subsequent amendments, and on 15 U.S.C. §§ 1, 2, 8, 9, 13, 15, 22 and 26, and related sections.

2. Venue is founded on 15 U.S.C. §§ 15 and 22, and 28 U.S.C. § 1391. Plaintiff and its assignors are residents of the State of Oregon. Defendants, and each

of them, are now and at all times herein mentioned have been transacting business and are found within this District.

3. "Plaintiff's assignors" are present and former owners of community pharmacies who have assigned to the plaintiff, for a valuable consideration, their causes of action under the antitrust laws. Plaintiff's assignors are set forth in Exhibit "A" to this complaint.

PLAINTIFF

4. Plaintiff is, and at all times herein mentioned has been, a non-profit corporation incorporated and in good standing under the laws of the State of Oregon, with its offices in Portland, Oregon. Plaintiff is composed of members who own and operate community pharmacies in the State of Oregon. One of its purposes is to secure and preserve equitable trade conditions for the practice of pharmacy and the benefit of its members and the public.

DEFENDANTS

5. Defendant Abbott Laboratories is an Illinois corporation with its principal office in North Chicago, Illinois, and transacts business in Oregon.

It is also a leading prescription drug producer which manufactures primarily hospital and pediatric, diagnostics, laboratory and hospital equipment, animal health, agricultural and chemical products. Some of

its better known products are Erythromycin antibiotic, Compocillin antibiotic, Nembutal, Placidyl sedative, vitamins, anoretics, cardiovascular agents, Similac (an infant formula), Murine eye care, golf balls and Sucaryl. Its sales

[R. 54]

exceeded $450 million in 1970.

6. Defendant American Home Products Corporation, a Delaware corporation with its principal office in New York City, is admitted to do business in Oregon, and transacts business in Oregon. Wyeth Laboratories, a division of American Home Products Corporation, transacts business in Oregon. It is a diversified producer of prescription drugs, goods and household products. Its sales during 1970 exceeded $1 billion. Some of its better known products are Ovral (an oral contraceptive), Equanil (a tranquilizer), Phenergan (anti-histamine), Premarin (estrogen), Omnipen (ampicillin), Atromid-S (anti-cholesterol), Anacin, Preparation H, Dristan, Kolynos (toothpaste), BiSoDol, Infrarub, Dondril (cold tablets), Griffin shoe polishes, Wizard (deodorizers), 3-in-1 Oil, Aero Shave, Aerosol Sani-Flush, Black Flag (insecticide), Easy-Off oven cleaner, Woolite soap, Chef Boy-Ar-Dee (food specialties), Frankly Dry Toasted Nuts, Jiffy Pop Popcorn, Dennison's Hot Chili, Teflon coated pots and pans, and E. J. Brach (candies).

7. Defendant Bristol-Myers Company is a Delaware corporation with its principal office in New York City, and transacts business in Oregon. Bristol Laboratories, a division of Bristol-Myers Company, transacts business in Oregon. It is a leading domestic producer of toiletries and prescription and proprietary drugs, household goods and nutritional formulations. Key products include Bufferin, Excedrin, Vitalis, Ban, Vote, Sal Hepatica, Clairol, Windex, Drano, Endust and Metrecal. Its net sales exceeded $980 million during 1970.

8. Defendant Carter-Wallace, Inc., a Delaware corporation with its principal office in New York City, transacts business in Oregon. It is engaged in making consumer products and prescription drugs. Its net sales exceeded $125 million in 1969. Some of its products are Arrid, Nair, Carter's Pills laxative, Miltown (meprobamate), Rondomycin, Frenchette (salad dressing) and pet food.

[R. 55]

9. Defendant Eli Lilly and Company, an Indiana corporation with its principal office in Indianapolis, Indiana, is admitted to do business in Oregon, maintains an office in Portland, Oregon, and transacts business in Oregon. It is one of the leading producers of pharmaceuticals with about 800 medicinal products for use and approximately 200 other items. Its net sales exceeded $590 million in 1970, and it has a net working capital in excess of $150 million, making it the largest U. S. ethical drug company with about

10% of the industry's volume. Its product line includes agricultural chemicals, analgesics, animal health products, animal nutrients and growth stimulants, antibiotics, anti-depressants, anti-diabetic agents, biologicals, bulk antibiotics, bulk chemicals, empty gelatin capsules, hematinics, hormones, lawn and garden products, sedatives, veterinary products, vitamins and beauty products (the last through its subsidiary, Elizabeth Arden Sales Corporation). Lilly owns 13 plants and facilities in the United States and Puerto Rico, maintains warehouse space in eight cities, and sales offices in 43 cities in the U. S. and Puerto Rico. In addition, its subsidiaries and affiliates own or lease plants and facilities in 23 foreign countries. It also owns a stockyard in Indianapolis and produces injection-molded plastic containers.

10. Defendant Endo Laboratories, Inc., a Delaware corporation with its principal office in Garden City, New York, transacts business in Oregon and is a subsidiary of E. I. DuPont de Nemours and Co., Inc., a Delaware corporation admitted to do business in Oregon, and transacts business in Oregon. DuPont de Nemours & Co. is the world's largest chemical company. It is engaged in manufacturing a vast array of products including those related to textiles, rubber, plastics, chemicals and allied products, transportation, petroleum refining, machinery, electrical, paper, printing, agriculture, metals and metal fabricating, construction,

sporting goods, explosives, film, industrial and biochemicals, pigments and many other products. It employs more than 100,000 persons and had net sales in 1970 exceeding $3 billion. Until recently DuPont was also the largest single stockholder in General Motors Corp.

11. Defendant Ortho Pharmaceutical Corporation, a New Jersey corporation with its principal office in New Brunswick, New Jersey, is a division of Johnson & Johnson, and transacts business in Oregon. Johnson & Johnson is a major producer of health care products. Its products include surgical dressings and consumable hospital products, drugs, textiles, industrial tapes, ligatures and sutures, surgical instruments, toiletries and hygenic products, baby care items, contraceptives, veterinary products, industrial tapes, paper products, sanitary napkins, Micrin mouthwash, disposable diapers, sedatives, muscle relaxants, antifungal drugs, sedatives, birth control pills, vaccines, needles and veterinary products. It maintains 61 manufacturing plants in 33 countries. Its net sales in 1970 exceeded $1 billion.

12. Defendant Squibb Corporation, a Delaware corporation with its principal office in New York City, transacts business in Oregon. Defendant was formed by the 1968 merger of Beech-Nut Life Savers and E. R. Squibb & Sons, Inc. Its operations encompass prescription drugs, food and confectionary items (through Beech-Nut and Dobbs House), cosmetics

(through Lanvin-Charles of the Ritz), surgical instruments (through Edward Weck & Co.), confections, and household products. Its net sales exceeded $700 million in 1970.

13. Defendant E. R. Squibb & Sons, Inc., a Delaware corporation with its principal office in New York City, transacts business in Oregon and is a subsidiary of defendant Squibb Corporation.

14. Defendant A. H. Robins Company, Inc., a Virginia corporation with its principal office in Richmond, Virginia, transacts business in Oregon. It is engaged in the manufacture and/or sale of

[R. 57]

pharmaceutical specialties, pet care products, cough and cold preparations, snack foods, French perfumes, lip balms, hand creams, potato chips, crackers, cookies, packaged nuts, tranquilizers, anti-rheumatics, and also operates pet departments. It net sales in 1970 were in excess of $130 million.

15. Defendant William H. Rorer, Inc., a Pennsylvania corporation with its principal office in Fort Washington, Pa., transacts business in Oregon. Defendant is a subsidiary of Rorer-Amchem, Inc., a Pennsylvania corporation. It deals primarily in pharmaceutical and agricultrual chemicals. Its most important products are Maalox, an antacid, and Aniban, a herbicide used largely in the growth of soy beans. It also makes surgical products, metalworking chem-

icals, plant growth regulators, preparations for skin disorders, sleep inducing drugs, weed killers, coatings for aluminum, copper and steel, and adhesive and sealing compounds. Its sales exceeded $130 million in 1970.

16. Defendant Warner-Lambert Pharmaceutical Company, a Delaware corporation with its principal office in Morris Plains, New Jersey, transacts business in Oregon. Warner-Chilcott Laboratories, a division of Warner-Lambert Pharmaceutical Company, transacts business in Oregon. It acquired (through merger), Parke, Davis & Co., an important drug producer, in 1970, as well as portions of Eversharp. It is an important factor in the production of drugs, chewing gum, opthalmic and optical products, shaving products and medical-scientific instruments. It manufactures Bromo-Seltzer, Anahist, Efferdent, Listerine, Pristeen, Schick, Dentyne, Chiclets, Clorets, Tridents, Certs, Rolaids, Smith Brothers Cough Drops, Richard Hudnut and DuBarry (cosmetics), Lactona (dental products), chemicals and many others. Its net sales in 1970 exceeded $1.2 billion.

[R. 58]

TRADE AND COMMERCE

17. The drug industry is a large and expanding one. The value of shipments by pharmaceutical manufacturers in the United States rose from about $900 million in 1947 to $4.7 billion in 1968, and to approx-

imately $7 billion in 1970. Defendants are among the largest manufacturers of drug products in the United States.

18. Defendants' operations have for some years involved the constant transmittal across state lines and in interstate commerce into Oregon of drugs and of advertisements, inducements, communications and other business transactions. Defendants and plaintiff's assignors obtain much of their product supply from defendant manufacturers within the normal course of business. Such purchases and deliveries directly affect the total volume of drug products shipped into Oregon, and affect, alter and modify the total volume shipped in interstate commerce.

19. Direct drug sales by manufacturers in 1969 in the United States totaled $4 billion. Of that total, $158.8 million, or 3.9 percent, were sold to the federal government and its hospitals. Direct sales to all types of hospitals totaled $764 million, up eight percent from 1968, and were approximately 20 percent of all 1969 drug sales.

20. Plaintiff's assignors are in direct competition with the favored customers of defendants for the patronage of ultimate consumers of defendants' drugs except enrolled patients hospitalized in the purchasing institution.

UNLAWFUL DISCRIMINATION

21. More than four years ago and continuing to

and including the date of the filing of this amended complaint, defendants and each of them unlawfully in the course of interstate commerce, in the sale of drugs of like grade and quality, by granting discounts, allowances, compensation, payments, services, brokerage, terms, facilities, rebates and lower

[R. 59]

prices than said commodities were sold to plaintiff's assignors, and such favorable discounts, allowances, compensation, payments, services, brokerage, terms, facilities, rebates and lower prices were not made available to plaintiff's assignors on equal terms.

22. Defendants' drugs were sold in interstate commerce for use, consumption, resale or distribution within the United States and multiple sales took place in interstate commerce.

23. The unjust and unlawful differentials set forth in paragraph 21 of this amended complaint are not attributable to differences in the cost of manufacture, sales or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

24. The exemption given sales to schools, colleges, universities, public libraries, churches, hospitals and charitable institutions not operated for profit by 52 Stat. 446, c. 283, 15 U.S.C. § 13c, where the drugs are employed for their own use, is limited to drugs used exclusively within the confines of the purchasing in-

stitution for enrolled patients of the institutions while such patients are so confined and for no other purpose.

25. Sale or distribution of any drug purchased at a discriminatory discount, allowance, compensation, payment, service, brokerage, term, facility, rebate or lower price by a non-profit institution to any person other than an enrolled patient in the purchasing institution is a violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13.

26. The exemption granted by 15 U.S.C. § 13c does not include cities, counties, states and the federal government other than in their capacities as operators of hospitals and charitable institutions not operated for profit when they administer drugs to enrolled patients.

27. Said acts of discrimination by defendants against plaintiff's assignors enable the favored competitors to offer drugs at no cost or nominal cost to their consumers and for sale at prices substantially

[R. 60]

below the retail prices that must be charged by plaintiff's assignors if they are to remain in business. Thus, plaintiff's assignors have been and are rendered less able to compete, and competition in said line of commerce has been, and is, substantially lessened and impaired.

28. The unlawful discrimination of the defendants

set forth herein compels plaintiff's assignors to pay a higher discriminatory unit cost for drugs of the same type.

29. The unlawful discrimination of the defendants set forth herein subsidizes defendants' favored purchasers with unearned and unjustified lower prices at the expense of plaintiff's assignors.

30. The unlawful discrimination of the defendants set forth herein compels plaintiff's assignors to contribute all or a disproportionate share of defendants' profits on drugs.

31. Said acts of discrimination by defendants against plaintiff's assignors constitute subsidized or below-cost sales to the favored purchasers at the expense of the retail customers of plaintiff's assignors, with resultant injury of said assignors and to the general public.

32. Said acts of discrimination by defendants against plaintiff's assignors preclude said assignors from competing successfully and threaten to, and if continued, will, terminate said assignors as competitors in drugs and cause them irreparable damage and reduce the number of competitors and thereby tend to create a monopoly, and to injure, destroy or prevent competition.

33. Said acts of discrimination by defendants against plaintiff's assignors have, to date, resulted in the failure of numerous community pharmacies in the State of Oregon, and unless said acts of discrimina-

tion are permanently enjoined, will result in the failure of an additional and substantial number of community pharmacies in the State of Oregon, including at least some of plaintiff's assignors.

[R. 61]

34. Defendants, directly and indirectly, sell drugs to proprietary nursing homes, hospitals and other institutions at more favorable discounts, allowances, compensation, payments, services, brokerage, terms, facilities, rebates and lower prices than are made available to plaintiff's assignors.

35. Said proprietary nursing homes, hospitals and other investor-owned institutions resell said drugs to staff personnel and to members of the public.

36. The defendants and each of them were and are aware that hospitals and other purchasers favored by defendants resell drugs to persons not confined to the hospital or other favored institution.

SECOND CAUSE OF ACTION

37. Plaintiff incorporates paragraphs 1 through 36 by reference.

38. Defendants, directly and indirectly, sell drugs to hospitals and other institutions not operated for profit on more favorable discounts, allowances, compensation, payments, services, brokerage, terms, facilities, rebates or lower prices than are available to plaintiff's assignors. Such hospitals and other institutions not operated for profit subsequently resell such

drugs to staff personnel and to members of the public who are not patients enrolled in said hospitals and other non-profit institutions.

• • • • •

(Subscription and certificate of service omitted in printing)

[R. 103]

United States District Court for the District of Oregon

PLAINTIFF'S CERTIFICATE AND STATEMENT

(Filed January 28, 1972; caption omitted in printing)

TO THE HONORABLE ROBERT C. BELLONI, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Plaintiff submits this certificate and statement pursuant to the Court's January 12, 1972 letter. The letter states in part:

> "1. Plaintiff's counsel will provide the Court with a certificate showing that they currently have information from which the Court can conclude that it is reasonably probable that discovery on the merits will produce evidence sufficient to establish each cause of action of the complaint. This statement should set forth facts now known to plaintiffs showing what each defendant did in its alleged practice of unlawful price discrimination. It would then tell the Court what it expects that discovery will reveal. Upon receipt of the certificate the Court will be able to determine whether plaintiff has more than surmise or suspicion and whether there is a reasonable likeli-

hood that discovery will produce relevant evidence. * * *"

This is a Robinson-Patman price discrimination and antitrust combination case on a matter of national importance to retail pharmacists

[R. 104]

and their customers. Customers of retail pharmacists are compelled to pay excessive prices for drugs because of discriminatory pricing practices engaged in by the defendants.

Not all drug manufacturers engage in the price discrimination alleged in the complaint and the trend is to charge retail pharmacies and other purchasers the same price and to treat everyone equally. Thus, Merck Sharp & Dohme announced on January 13, 1971 that "The prices listed for our products now apply to all customer classes: wholesalers, hospitals, retailers, chain retailers and physicians."

A harbinger of the complaint at bar is the stipulation of dismissal in *Contra Costa Pharmaceutical Association* v. *Ciba Corporation*, USDC ND Calif., No. 46218, filed November 3, 1967, which reads in part:

> "Ciba represents, subject to all defenses available to it under state or federal laws, that no free goods offers or price discounts will be made, after the date hereof, to any profit hospital or profit-making clinic which sells those goods to other than in-patients or out-patients being treated at

> such institutions unless such offers and discounts are concurrently made to all plaintiff retail pharmacists selling Ciba products in competition with such hospital or clinic."

Plaintiff incorporates by this reference its answers to defendants' numerous interrogatories.

It cannot be emphasized too strongly that the plaintiff has had no discovery while at the same time the defendants have had and continue to have the benefits of massive discovery. The latest example of this one-sided state of affairs is the compilation, *infra*, of hospital pharmacies that sell prescription drugs to persons other than in-patients.

Plaintiff's certificate and statement is voluminous because the defendants have declined to answer the complaint, filed six months ago, or the amended complaint filed in November of 1971. No defendant has answered the interrogatories filed and served on August 6, 1971.

Accordingly, plaintiff has been compelled to document matters that it expects to be admitted when the defendants finally answer the amended complaint and to be established, e.g., discriminatory pricing, when the August 6, 1971, interrogatories are answered.

[R. 105]

In addition to the materials presented in this statement, counsel has *Hickman* v. *Taylor*-type attorney trial-preparation materials. These trial prepara-

tion materials are available for *in camera* examination by the Court.

Plaintiff and plaintiff's counsel expect and certify that the promised discovery will confirm what is set forth in this document and is known to plaintiff's officers and members, massive and damaging price discrimination in violation of the Robinson-Patman Act.

Plaintiff's counsel certify that they expect discovery, when allowed, to establish that the defendants engage in activities that constitute a combination and concert of action prohibited by the antitrust laws, e.g., discriminatory pricing and trade practices, use of cross-licensing to violate the antitrust laws, and more than conscious price parallelism.

Each of the defendants engage in illegal price discrimination and discriminatory trade practices. Discovery will establish, for example, which of the defendants that sell directly to retail pharmacists insist on a minimum dollar amount order while at the same time not imposing a similar requirement on hospitals.

One of the more entertaining proofs of price discrimination is defendant Endo Laboratories, Inc. invoice LA 7180 dated 8/4/71, account no. 84883, to:

"BODINE CLINIC
LOGAN WALLACE PRESCRIPTIONS
1735 N. Wheeler
Portland, Oregon 97227"

Mr. Logan Wallace of Logan Wallace Prescriptions, is president of the plaintiff.

Because Endo Laboratories, Inc. considers Logan Wallace Prescriptions a "clinic," the exact word on invoice, Logan Wallace Prescriptions received two benefits given favored purchasers that are denied other retail pharmacists: the opportunity to make purchases directly from Endo Laboratories, Inc., and the opportunity to receive a discount denied

[R. 106]

other retail pharmacies. The non-favored retail pharmacies which do not receive the status of "clinic" must purchase Endo products from a wholesaler.

Invoice La 7180 lists various products (Percodan, Coumadin, Valpin and Percogestic tablets) for a total price of $424.72, less a one-sixth or 16-2/3 percent discount of $70.78 and a net billing price of $353.94. In addition, Logan Wallace Prescriptions was allowed a two percent discount for prompt payment. Endo Laboratories, Inc. accepted Logan Wallace Prescriptions check no. 1741, dated 8/16/71, in the amount of $346.86 for Invoice LA 7180.

Defendant William H. Rorer, Inc. published a retail price list for its drugs. One of the items listed is Maalox, 12 fl. oz. with a suggested list price from the wholesaler to the retailer of $1.25 and a "SUGGESTED RESALE PRICE" of $1.69. However, a Portland area discount store, "K-Mart," has been

selling Maalox, 12 fl. oz. at forty-seven cents ($.47) while the drug wholesaler's price is about $1.17.

The Warner-Chilcott Laboratories of defendant Warner-Lambert Pharmaceutical Company require a minimum order of $250 from a community pharmacy, but will sell any quantity to a non-profit hospital and require a minimum purchase of but $20 from a profit-making hospital.

Price sheets of the Bristol Laboratories Division of Bristol-Myers Company reproduced on pages A12 through A16 of volume 1 of the House Small Business Committee hearings on "Small Business Problems in the Drug Industry" reflect higher prices to retail pharmacists than to favored hospitals, e.g., the retail price for Polycyllin-N 250mg. is $1.74 to the community pharmacist but only $1.48 to hospitals. Similarly, the retail pharmacy price for Bristalin syrup 4 oz. is 60 cents; the hospital price is 50 cents.

[R. 107]

The House Small Business Committee hearings confirm that defendant Bristol-Myers Company grants hospitals substantially lower prices. Page A12 of the hearing record discloses that effective August 2, 1965, retail pharmacists were charged $8.94 for 48 capsules of Prostaphlin 250 mg. Page A30 of the hearing record reveals a December 22, 1965, Bristol-Myers hospital contract for 48 capsules of Prostaphlin 250 mg. at $4.80. The contract also listed one dose

of Staphcillin 1.00 gm. at $1.00 while retail pharmacists paid $1.91 for the same drug, according to the price list on page A12.

Various of the defendants sell drugs in Canada. It is significant, therefore, that discriminatory drug pricing in Canada was noted in "Pharmacy in a New Age," (1971), the report of the Commission on Pharmaceutical Services published by the Canadian Pharmaceutical Association.

The report said at pages 29-30:

> "Another area which seriously affects pharmacy practice is the discriminatory pricing methods which have forced community pharmacists to pay a higher price for drugs than hospitals or government, even for similar quantities. * * * In Prince Edward Island a change was made in the policy of providing anti-diebetic drugs through pharmacies to direct distribution by the government because the drugs 'were purchased from the manufacturers at greatly reduced prices.'

(no paragraph)

One firm in giving testimony to the Harley Committee explained its system of preferential prices in that it:

> 'sells some of its products to hospitals at a lower price than that charged to pharmacists. * * * We compete for the hospital business at prices which are sometimes below cost and consider this activity as part of the promotion of our products to the professional staff. * * *" (footnote omitted)

[R. 108]

Plaintiff incorporates by this reference exhibits "A" through "M" inclusive to this certificate and statement.

CONCLUSION

Plaintiff submits that this certificate and statement demonstrates that the plaintiff has ample documentary and other information from which the Court can conclude that it is reasonably probable that discovery on the merits will produce evidence sufficient to establish each cause of action of the complaint.

DATED: January 28, 1972.

(Subscription omitted in printing)

[R. 117]

EXHIBIT D TO PLAINTIFF'S CERTIFICATE AND STATEMENT

DRUG INDUSTRY RESTRICTIONS ON DRUGS

Drug industry restrictions on prescription drugs, drug industry practices and conscious price parallelism are among the factors upon which the plaintiff bases its antitrust combination count.

Several restrictive practices are set forth in Herbert D. Miller, Jr., "Patent License Restrictions in the Prescription Drug Industry," 53 Virginia L.R. 1283 (1967).

The article states at 53 Va. L.R. 1285-1286:

"As a result one might expect the prices of ethical drugs to be established by individual manufacturers largely on the basis of their cost functions, and without reference to the prices charged by competitors. Since the production and promotional costs of sellers are quite likely different, their prices should reflect this difference. However, where major producers are concerned, this is frequently not the case.

(no paragraph)

Erythromycin, a broad spectrum antibiotic patented by Abbott Laboratories in 1958, will serve as an example. In 1959 Abbott produced thirty-five per cent of the total supply, and Lilly produced sixty-five per cent. Upjohn sold, but did not produce, the compound. The prices set by these companies during the period 1959-1965 are shown below:

TABLE II

"Erythromycin, wholesale price per 100-250 *mg. tablets*

	1959	1960	1962	1963	1964	1965
Abbott (Erythrocin Stearate)	$30.60	$30.60	$26.01	$21.99	$21.99	$21.99
Upjohn (Erythromycin)	35.70	35.70	26.01	21.99	21.99	21.99
Lilly (Ilotycin)	30.60	30.60	26.01	21.99	21.99	21.99

"The prices of other patented antibiotics and tranquilizers have behaved similarly. Since the normal oligopoly explanation for this price behavior is logically inapposite, it is clear that other factors determine the price at which drugs will be sold." (footnotes omitted)

[R. 118]

The article states at 53 Va. L.R. 1290-1291:

"* * * Since production costs tend to be constant regardless of the size of the manufacturer's operation, drug patents appear to constitute the only serious obstacle to competition by small firms in this market. * * *

The patented tranquilizers purchased by the Military Supply Agency — meprobamate, promazine and chlorpromazine — have been offered at rigid prices only 25 to 35 per cent below the price to the retail druggist.

(no paragraph)

Reserpine, on the other hand, although developed by CIBA Pharmaceutical Co., has been widely licensed. * * * MMSA's first reported procurement, February 1956, was won by Eli Lilly with a bid of $1.39 per bottle of 1000, which is one twenty-fifth of Lilly's price to the druggist.

(no paragraph)

Since that time MMSA's reserpine price has steadily fallen. In February 1959, CIBA won a contract with a bid of 60 cents a bottle (only 1.5 per cent of CIBA's price to the re-

tail druggist of $39.40). And by the date of the last reported procurement, April 1960, the price had dropped to 51 cents a bottle. MMSA was buying 1000 tablets at about the cost of 15 tablets to the civilian druggist.

(no paragraph)

On one or more occasions, each of the four major sellers of this product—CIBA, Lilly, Squibb and Merck—made bids which were less than one-twentieth of their price to the retail druggists.

* * *

"The ethical drug industry has taken steps to minimize this type of competition. Since firm-name protection is ineffective in this submarket, the large scale manufacturers have utilized patent licenses to protect themselves. The remainder of this Article explores the use of the patent license to insulate large-scale drug manufacturers from competition by small producers in the institutional purchaser submarket."
(footnote omitted)

[R. 121]

EXHIBIT G TO PLAINTIFF'S CERTIFICATE AND STATEMENT

The July 5, 1971 *National Observer* contains an article titled "Foreigners Pay Less for U.S. Drugs, Study Says," and an overline that "Companies Dispute Findings," which said in part:

"A new study of drug-industry pricing prac-

tice makes melancholy reading for consumers—who annually spend $7 billion on drugs.

"The study of prices for 20 of the most widely prescribed medicines reveals that U. S. drug producers often charge more for drugs here than they do abroad—up to four times as much for identical amounts. It says that 'price discrimination' probably is the reason.

"The report contrasts average prices paid by U.S. pharmacists with the prices paid by retailers in eight other countries.

(no paragraph)

It relates, for example, that Eli Lilly & Co., exclusive distributor here of the pain killer Darvon, sells a unit of the drug to U.S. buyers for $7.02, while charging retailers in Ireland $1.66 and those in the United Kingdom $1.92 for the same unit.

* * *

"According to reports of a Senate subcommittee on monopoly, however, drug producers do not make overseas all the drugs they sell there. The manufacturers do export, often charging less for exported products than for the same medicine sold at home. Moreover, subcommittee data indicates that labor costs constitute a relatively small part of drug-making expenses even in the United States. * * *"

A chart printed with the above-quoted article lists the price findings.

Erythrocin antibiotic, manufactured by Abbott Laboratories, a defendant herein, was listed as having a United States price of $26.12, the highest of the nations surveyed, with the lowest price, of $8.56, for Ireland.

Polycillin antibiotic, manufactured by defendant Bristol-Myers Co., was listed at a U.S. price of $21.84, a Brazil price of $49.95 and a low price of $8.23 in the United Kingdom.

Wyeth's U.S. price for Equanil was $7.06 and its lowest price was $1.67 for Sweden.

Lilly's V-Cillin-K price was $8.95 in the U.S. and $2.40 in the United Kingdom.

(Certificate of service omitted in printing)

United States District Court for the District of Oregon

EXHIBIT A TO PLAINTIFF'S SUPPLEMENT TO CERTIFICATE AND STATEMENT (EXCERPT)

(Filed February 18, 1972)

[R. 170]

TABLE 1.—Comparison of seleced pharmaceutical prices in the United States and eight foreign countries, January 1970

(All prices in U. S. dollars for 100 tablets or capsules)

Generic name	Price to druggist, brand name, and manufacturer			
	United States	Australia	Brazil	Canada
Analgesic:				
Propoxyphene HCl (65 mg.)	$7.02 Darvon Lilly	$2.73 Dolozene Lilly	$3.72 Doloxene Lilly	$5.29 Darvon Lilly
Antibiotics:				
Ampicillin (250 mg.).	21.84 Poiycillin Bristol	20.48 Penbritin Bristol	41.95[2] Polycillin Bristol	22.18[3] Ampicin Bristol
Demethylchlor-tetracycline HCl (150 mg.).	19.79 Declomycin Lederle	11.17 Ledermycin Lederle	4.93 Ledermicina Cyanamid Quim do Brasil[5]	16.09 Declomycin Lederle
Erythromycin *(250 mg.)*.	26.12 Erythrocin Abbott	14.51 Erythrocin Abbott	*11.92*[1] Pantomicina Abbott	25.04 Erythrocin Abbott
Oxytetracycline HCl (250 mg.).	20.48 Terramycin Pfizer	9.79 Terramycin Pfizer	4.63 Terramicina Pfizer	16.92 Terramycin Pfizer
Potassium phenoxy-methylpenicillin (250 mg.).	8.95 V-Cillin-K Lilly	6.11 P.V.K. Lilly	8.66[1] V-Cil-K Lilly	10.69[1] V-Cillin-K Lilly
Tetracycline HCl (250 mg.).	5.34[7] Achromycin-V Lederle	9.79 Achromycin-V Lederle	4.22 Achromycin-V Cyanamid Quim do Brasil[5]	12.64 Achromycin-V Lederle
Antidepressant:				
Amitriptyline HCl (25 mg.).	8.55 Elavil Merck	3.33 Tryptanol Merck	2.26[1] Tryptanol Merck	6.30 Elavil Merck
Antidiabetic:				
Tolbutamide (500 mg.).	8.23[1] Orinase Upjhon	2.83 Rastinon Hoechst	2.77 Rastinon Hoechst	6.34[1] Orinase Hoechst

Generic name	Price to druggist, brand name, and manufacturer—Continued			
	United States	Australia	Brazil	Canada
Antihistamine:				
Diphenydramine HCl[10] (50 mg.).	2.22 Benadryl Parke-Davis	1.60[1] Benadryl Parke-Davis	.81 Benadryl Parke-Davis	2.77 Benadryl Parke-Davis
Ataraxics (tranquilizers):				
Chlordiazepoxide HCl (10 mg.).	6.40[1] Librium Roche	3.74 Librium Roche	2.40[1] Librium Roche	5.45 Librium Roche
Chlorpromazine HCl (50 mg.).	6.60 Thorazine SKF[11]	2.22 Largactil May & Baker[11]	2.47[1] Amplictil Rhodia[11]	5.82[1] Largactil Rhone-Poulenc[11]
Diazepam (5 mg.).	8.03 Valium Roche	3.74 Valium Roche	3.62[1] Valium Roche	6.01 Valium Roche
Meprobamate (400 mg.).	7.06 Equanil Wyeth	4.17 Equanil Wyeth	1.91[12] Equanil Wyeth	5.13[1] Equanil Wyeth
Prochlorperazine maleate (10 mg.).	7.86 Compazine SKF	4.44[1] Stemetil May & Baker	2.45[1] Tementil Rhodia	6.05[1] Stemetil Rhone-Poulenc[11]

Generic name	Price to druggist, brand name, and manufacturer—Continued			
	United States	Australia	Brazil	Canada
Trifluoperazine HCl (5 mg.).	9.75 Stelazine SKF	4.70 Stelazine SKF	2.42[1] Stelazine SKF	8.33 Stelazine SKF
Cardiovascular:				
Digoxin (.25 mg.).	1.03 Lanoxin B-W	.69 Lanoxin B-W	1.31[16] Digoxina B-W	1.51[17] Lanoxin B-W
Oral contraceptive:				
Ethynodial diacetate with mestranol (6x21 tabs, 1 mg.).	7.38 Ovulen 21 Searle	4.11 Ovulen 21 Searle	4.82 Ovulen 20[18] Searle	5.95[1] Ovulen 21 Searle
Sedative:				
Glutethimide (250 mg.).	3.00 Doriden Ciba	2.11 Doriden Ciba	1.97[1] Doriden Ciba	2.67 Doriden Ciba
Sulfonamide:				
Sulfisoxarole (500 mg.).	2.94 Gantrisin Roche	3.00[1] Gantrisin Roche	1.51 Gantrisin Roche	3.06 Gantrisin Roche

Generic name	Price to druggist, brand name, and manufacturer—Continued				
	Ireland	Italy	New Zealand	Sweden	United Kingdom
Analgesic:					
Propoxyphene HCl (65 mg.)	$1.66 Doloxene Lilly	$7.86[1] Doloxene Lilly	$2.08 Doloxene Lilly	$3.33 Doloxene Lilly	$1.92 Doloxene Lilly
Antibiotics:					
Ampicillin (250 mg.).	9.31 Pentrexyl Bristol	19.15[1] Sintopenyl Aesculaplus[4]	11.30[1] Penbritin Beecham	16.58 Pentrexyl Bristol	8.23 Penbritin Beecham[4]
Demethylchlortetracycline (150 mg.).	8.97[1] Ledermycin Lederle	17.88[1] Ledermicina Cyanamid[5]	3.87 Ledermycin Lederle	19.43 Ledermycin Lederle	8.20 Ledermycin Lederle
Erythromycin (250 mg.).	8.56 Erythrocin Abbott	24.57[1] Eritrocina Abbott	10.88 Official price	19.21 Erythromycin Abbott	10.02 Erythrocin Abbott
Oxytetracycline HCl (250 mg.).	7.74 Terramycin Pfizer	13.27[1] Terramicina Pfizer	3.68 Official price	13.04 Terramycin Pfizer	9.06 Terramycin Pfizer
Potassium phenoxymethylpenicillin.	2.77 Penicillin-V Lilly	([6])	2.99 Official price	([6])	2.40 V-Cil-K Lilly
Tetracycline HCl (250 mg.).	3.42 Achromycin-V Lederle	10.84[1] Acromycina Cyanamid[5]	13.78[1] Achromycin-V Lederle	13.89 Achromycin-V Lederle	5.04 Achromycin-V Lederle

Generic name	Price to druggist, brand name, and manufacturer—Continued				
	Ireland	Italy	New Zealand	Sweden	United Kingdom
Antidepressant:					
Amitriptyline HCl (25 mg.).	2.26 Tryptizol Merck	4.22[1] Triptizol Merck	4.20[3] Tryptanol Merck	3.09 Tryptizol Merck	2.28 Tryptizol Merck
Antidiabetic:					
Tolbutamide (500 mg.).	2.22[1] Rastinon Hoechst	2.86[1] Rastinon Hoechst	([9])	4.85 Rastinon Hoechst	2.28 Rastinon Hoechst
Antihistamine:					
Diphenhydramine HCl[10] (50 mg.).	1.37[1] Benadryl Parke-Davis	2.60[1] Benadryl Parke-Davis	1.29[1] Official price	2.33[1] Benadryl Parke-Davis	1.20[1] Benadryl Parke-Davis
Ataraxics (tranquilizers):					
Chlordiazepoxide HCl (10 mg.).	2.05 Librium Roche	3.55[1] Librium Roche	1.83[1] Librium Roche	3.11 Librium Roche	2.40 Librium Roche
Chlorpromazine HCl (50 mg.).	1.71[1] Largactil May & Baker	3.47[1] Largactil Farmitalia[11]	1.82[1] Official price	2.88 Largactil Rhodia	1.68[1] Largactil May & Baker
Diazepam (5 mg.).	2.46 Valium Roche	3.42[1] Valium Roche	2.72 Official price	3.71 Valium Roche	2.88 Valium Roche
Meprobamate (400 mg.).	1.79[1] Equanil Wyeth	3.65[1] Quanil Wyeth	2.06 Official price	1.67 Equanil Ferrosan[13]	1.74[1] Equanil Wyeth

Generic name	Price to druggist, brand name, and manufacturer—Continued				
	Ireland	Italy	New Zealand	Sweden	United Kingdom
Prochlorperazine maleate (10 mg.).	2.87 Stemetil May & Baker	3.04[1] Stemetil Farmitalia	2.93[1] Official price	2.28 Stemetil LEO[14]	3.04[1] Stemetil SKF
Trifluoperazine HCl (5 mg.).	2.78[1] Stelazine SKF	3.82[1] Modalina Maggioni[15]	3.71 Official price	4.41[1] Terfluzin Rhodia	2.59 Stelazine SKF
Cardiovascular: Digoxin (.25 mg.).	.53 Lanoxin B-W	1.73[1] Lanoxin Wellcome	.52[1] Official price	.98 Lanoxin B-W	.38 Lanoxin B-W
Oral contraceptive: Ethynodial diacetate with mestranol. (6x21 tabs, 1 mg.).	3.59 Ovulen 21 Searle	8.20 Ovulen Lepetit[16]	3.56 Official price	4.51 Ovulen 21 Searle	4.10 Ovulen 21 Searle
Sedative: Glutethimide (250 mg.).	.92 Doriden Ciba	1.80[1] Doriden Ciba	1.23 Official price	2.06 Doriden Ciba	1.00 Doriden Ciba
Sulfonamide: Sulfisoxarole (500 mg.).	1.64 Gantrisin Roche	2.47[1] Gantrisin Roche	1.11[1] Gantrisin Roche	2.83[1] Gantrisin Roche	1.92 Gantrisin Roche

(Footnotes and certificate of service omitted in printing)

AFFIRMATIVE DEFENSES IN DEFENDANTS' ANSWERS BASED ON 15 U.S.C. § 13c

[R. 182]

United States District Court for the District of Oregon

Answer of Defendant Endo Laboratories, Inc., to Plaintiff's Amended Complaint

(Filed October 4, 1972; caption omitted in printing)

* * * * *

[R. 184]

THIRD DEFENSE TO FIRST CAUSE OF ACTION

All sales of defendant's products to hospitals and charitable institutions not operated for profit are exempt from the Robinson-Patman Act under the provisions of 15 USC § 13(c).

* * * * *

[R. 185]

* * * * *

THIRD, FOURTH, FIFTH, SIXTH, SEVENTH AND EIGHTH DEFENSES TO SECOND CAUSE OF ACTION

Defendant incorporates herein by reference its third, fourth, fifth, sixth, seventh and eighth defenses to plaintiff's first cause of action, as though fully set forth herein.

* * * * *

[R. 188]

United States District Court for the District of Oregon

Answer of Defendant American Home Products Corporation to Plaintiff's Amended Complaint

(Filed October 4, 1972; caption omitted in printing)

* * * * *

[R. 191]

* * * * *

FIRST AFFIRMATIVE DEFENSE TO FIRST CAUSE OF ACTION

All sales of defendant's products to hospitals, and to institutions not operated for profit are exempt from the Robinson-Patman Act under the provisions of 15 USC Sec. 13c.

* * * * *

[R. 192]

* * * * *

SECOND CAUSE OF ACTION

I

Defendant realleges and incorporates herein its answers and affirmative defenses to plaintiff's first cause of action.

* * * * *

[R. 196]

United States District Court for the District of Oregon

Answer of Defendant E. R. Squibb & Sons, Inc., to Amended Complaint

(Filed October 4, 1972; caption omitted in printing)

* * * * *

FIRST CAUSE OF ACTION

* * * * *

THIRD DEFENSE

All sales of this defendant's products to schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit are exempt from the Robinson-Patman Act under the provisions of 15 U.S.C., Sec. 13c.

* * * * *

[R. 198]

* * * * *

SECOND CAUSE OF ACTION

* * * * *

SECOND, THIRD, FOURTH AND FIFTH DEFENSES

This defendant incorporates its second, third, fourth and fifth defenses to plaintiff's first cause of action.

* * * * *

[R. 201]

United States District Court for the District of Oregon

Answer of Defendant Squibb Corporation to Amended Complaint

(Filed October 4, 1972; caption omitted in printing)

* * * * *

FIRST CAUSE OF ACTION

* * * * *

[R. 202]

* * * * *

FOURTH DEFENSE

All sales of E. R. Squibb & Sons, Inc.'s products to schools, colleges, universities, public libraries, churches, hospitals and charitable institutions not operated for profit are exempt from the Robinson-Patman Act under the provisions of 15 U.S.C., Sec. 13c.

* * * * *

[R. 203]

SECOND CAUSE OF ACTION

* * * * *

SECOND, THIRD, FOURTH, FIFTH AND SIXTH DEFENSES

This defendant incorporates its second, third, fourth and fifth defenses to plaintiff's first cause of action.

* * * * *

[R. 205]

United States District Court for the District of Oregon

Answer of Defendant Eli Lilly and Company to Plaintiff's Amended Complaint

(Filed October 4, 1972; caption omitted in printing)

* * * * *

[R. 208]

* * * * *

THIRD DEFENSE TO SECOND CAUSE OF ACTION

Purchases of Lilly products by hospitals, and charitable institutions not operated for profit are exempt from the Robinson-Patman Act under 15 U.S.C. § 13c (May 26, 1938, c. 283, 52 Stat. 446).

* * * * *

[R. 212]

United States District Court for the District of Oregon

Answer of Defendant Bristol-Myers Company to Plaintiff's Amended Complaint

(Filed October 4, 1972; caption omitted in printing)

* * * * *

[R. 216]

* * * * *

THIRD DEFENSE TO SECOND CAUSE OF ACTION

All sales of defendant's products to hospitals and to institutions not operated for profit are exempt from the Robinson-Patman Act under the provisions of 15 U.S.C. § 13c.

* * * * *

[R. 220]

United States District Court for the District of Oregon

Answer of Defendant A. H. Robins Company, Incorporated to Plaintiff's Amended Complaint

(Filed October 5, 1972; caption omitted in printing)

* * * * *

[R. 222]

* * * * *

ANSWER TO SECOND CAUSE OF ACTION

* * * * *

[R. 223]

* * * * *

Fifth Defense

18. Sales of defendant Robins' pharmaceutical products to hospitals and charitable institutions not operated for profit for their own use are exempt from the Robinson-Patman Act under the provisions of 15 U.S.C. Section 13c.

* * * * *

[R. 228]

United States District Court for the District of Oregon

Answer of Defendant Abbott Laboratories

(Filed October 5, 1972; caption omitted in printing)

* * * * *

[R. 233]

* * * * *

FOR ITS THIRD AFFIRMATIVE ANSWER AND DEFENSE, Abbott alleges as follows:

I

As a matter of law, all sales by Abbott to proprietary nursing homes, hospitals and other institutions, and to hospitals and other institutions not operated for profit, as those terms are used in plaintiff's second cause of action, are within the exemption

[R. 234]

of the Non-Profit Institutions Act, 15 U.S.C. § 13(c), and are, accordingly, not cognizable under the Robinson-Patman Act.

* * * * *

[R. 237]

United States District Court for the District of Oregon

William H. Rorer, Inc. Answer to Amended Complaint

(Filed October 5, 1972; caption omitted in printing)

* * * * *

[R. 240]

* * * * *

SIXTH DEFENSE

Any price differential accorded by this defendant to the alleged favored purchasers of its products was with respect to transactions exempt from coverage of the Robinson-Patman Act pursuant to 15 USC § 13c as a sale to a hospital or charitable institution not operated for profit.

* * * * *

[R. 243]

United States District Court for the District of Oregon

Answer of Defendant Carter-Wallace, Inc.

(Filed October 5, 1972; caption omitted in printing)

* * * * *

Fourth Defense

Sales by defendant Carter-Wallace, Inc. to non-profit institutions are exempt from the Robinson-Patman Act by reason of the provisions of 15 USC § 13 (c).

* * * * *

[R. 246]

United States District Court for the District of Oregon

Answer of Defendant Warner-Lambert Company to Amended Complaint

(Filed October 5, 1972; caption omitted in printing)

* * * * *

[R. 253]

* * * * *

FIFTH AFFIRMATIVE DEFENSE

The claims of plaintiff are barred, in part, by 15 USC § 13c.

* * * * *

[R. 256]

United States District Court for the District of Oregon

Answer of Defendant Ortho Pharmaceutical Company to Amended Complaint

(Filed October 25, 1972; caption omitted in printing)

* * * * *

[R. 263]

* * * * *

FIFTH AFFIRMATIVE DEFENSE

53. The claims of plaintiff are barred, in part, by 15 USC § 13c.

* * * * *

(Subscriptions and certificates of service omitted throughout in printing)

[R. 289]

United States District Court for the District of Oregon

ORDER

(Filed October 30, 1972; caption omitted in printing)

Plaintiff's motion to prohibit destruction of documents by the defendants having been heard on October 24, 1972, and counsel appearing for all parties, it is hereby

CONSIDERED AND ORDERED that the motion be denied in its entirety.

* * * * *

(Subscription omitted in printing)

[R. 323]

United States District Court for the District of Oregon

PLAINTIFF'S SECOND SUPPLEMENTAL CERTIFICATE AND STATEMENT

(Filed December 4, 1972; caption omitted in printing)

To: The Honorable James M. Burns,
United States District Judge:

Pursuant to Judge Belloni's January 12, 1972, letter Order that the plaintiff submit a certificate and statement, the plaintiff herewith supplements its January 28, 1972 certificate of evidence and its February 18, 1972, supplement.

Exhibit A is a reprint of Senator Gaylord Nelson's documented remarks on drug price discrimination printed in the September 29, 1972 *Congressional Record*. References to various of the defendants here-

in are underlined in red. Senator Nelson concluded:

> "* * * Under the present system the American people who are paying higher prices for drugs than anyone else in the world, are being subjected to monopolistic exploitation. * * *"

DATED: December 4, 1972.

(Subscription and certificate of service omitted in printing)

[R. 339]

United States District Court for the District of Oregon

PLAINTIFF'S MOTION RE LIMITED DISCOVERY AND BRIEF IN SUPPORT OF MOTION

(Filed February 5, 1973; caption omitted in printing)

Pursuant to prior orders of the Court and Rule 30, F.R.Civ.P., and without waiving its objections to limitations on discovery, Plaintiff moves the Court for an Order that:

(1) Within 15 days of the date of this Order, each defendant shall notify plaintiff of the name of its manager, salesman or other representative residing in Oregon most knowledgeable concerning sale of the defendant's drugs to alleged "non-profit" hospitals in Multnomah, Clackamas and Washington counties;

(2) Plaintiff may take the depositions of the persons identified in response to Paragraph (1) of this Order and serve upon them the EXHIBIT A TO SUBPOENA attached to plaintiff's motion.

DATED: February 5, 1973.

(Subscription omitted in printing)

[R. 340]

BRIEF IN SUPPORT OF MOTION

Plaintiff's limited discovery to date has established that there are many unknown and disputed facts concerning the issue of drug distribution practices of alleged "non-profit" hospitals.

It is submitted that these unknown and disputed facts preclude partial summary judgment on the pending summary judgment motion.

Plaintiff's limited discovery establishes, it is submitted, that defendants have relevant evidence concerning the drug distribution practices of alleged non-profit hospitals that plaintiff has been unable to obtain from the hospital officials deposed by plaintiff.

The Exhibit A to Subpoena accompanying the motion is limited to *some* documents relevant to the pending motion for partial summary judgment, although the exhibit does not call for all of the documents the plaintiff considers should be produced, e.g., in deference to the Court's prior ruling plaintiff does not call for price information.

Defendants and their representatives resident in Oregon have evidence relevant to their pending motion, therefore, the motion should be granted.

DATED: February 5, 1973.

(Subscription and certificate of service omitted in printing)

[R. 343]

United States District Court for the District of Oregon

AFFIDAVIT OF RAYMOND L. MONTEE RE HOSPITAL DRUG PURCHASES

(Filed February 5, 1973; caption omitted in printing)

STATE OF OREGON)
County of Multnomah) ss.

I, RAYMOND L. MONTEE, being first duly sworn, depose:

I

I am the President of R. L. Montee & Associates, Incorporated, an Oregon corporation that provides specialized investigation services for the professional man, and that I have been retained by the law firm of Tilbury & Kane, counsel for plaintiff in the above-titled case.

II

Pursuant to direction I made purchases of prescription and over-the-counter drugs as a member of the public from various hospital pharmacies in Multnomah, Clackamas and Washington counties.

III

At no time in offering prescriptions to be filled or in purchasing non-prescription drugs did I represent that I was (a) an inpatient, or (2) an outpatient, or (3) a hospital employe, or (4) a physician.

[R. 344]

IV

I purchased prescriptior drugs from 11 hospital pharmacies.

V

Listed below are the names and addresses of said hospital pharmacies, the prescription number, date of purchase, and name of the prescription drug purchased. Also listed are purchases of over-the-counter drugs that do not require a prescription.

(1) Kaiser Foundation Hospital Pharmacy
5055 N. Greeley Avenue
Portland, Oregon 97217

No. 138964, 10/04/72 Stilbestrol 0.5 mg. #30

Dermaplast Spray — Small

(2) St. Vincent Hospital and Medical Center Pharmacy
9205 S. W. Barnes Road
Portland, Oregon

No. 162827, 10/09/72 (drug not identified)

No. 162828, 10/09/72 (drug not identified)

(3) Dwyer Memorial Hospital Pharmacy
420 - 32nd Street
Milwaukie, Oregon

No. 13472, 10/05/72, Benadryl 25 m

No. 13473, 10/05/72, Tetracycline 250 mg

(4) Forest Grove Community Pharmacy
1809 Maple Street
Forest Grove, Oregon

No. 67502, 10/04/72, Prednisone 5 mg

No. 67503, 10/04/72, (drug not identified)

(5) City of Roses Hospital Pharmacy
1329 S. E. Harney Street
Portland, Oregon 97202

No. 33826, 10/05/72, Hydrodiuril 50 mg.

No. 33827, 10/05/72, Coumadin 5 mg

(6) Gresham Community Hospital
5th and Beech
Gresham, Oregon 97030

No. 55458, 10/11/72, Indocin 25 mg

[R. 345]

(7) Holladay Park Hospital Pharmacy
220 N. E. Multnomah
Portland, Oregon

No. 102-202, 10/05/72, Penicillin VK 250 mg.

No. 102-203, 10/05/72, Chlortrimeton 4 mg.

(8) Portland Adventist Hospital
6040 S. E. Belmont
Portland, Oregon

No. 59798, 10/05/72, V-Cillin K 250 mg

Neosporin Ointment, NDC-81-730-88,
Net wt ½ oz

(9) Willamette Falls Community Hospital Pharmacy
15th and Division
Oregon City, Oregon 97045

No. 2538, 10/16/72, (drug not identified)

Ecotrin aspirin-analgesic, bottle, 100 tablets

(10) Willamette Methodist Convalescent Center
13021 S. E. River Road
Milwaukie, Oregon

No. 25251, 10/16/72, 30 Serpasil .1

Neoloid Castor Oil, 4 fl. oz.

(11) Woodland Park Hospital Pharmacy
10300 N. E. Hancock
Portland, Oregon

No. 56257, 10/05/72, Erythrocin 250 mg
(ABBOTT LABORATORIES)

Quelidrine cough syrup 4 fl. oz.

VI

In addition, I directed a female operative to purchase prescription drugs from four Permanente Clinic pharmacies associated with the Bess Kaiser Hospital, Portland, Oregon.

VII

Listed below are the names and addresses of said Permanente clinic pharmacies, the prescription number, date of purchase, and name of the prescription drug purchased. Also listed are purchases of over-the-counter drugs that do not require a prescription.

* * * * *

(Subscription, jurat and certificate of service omitted in printing)

[R. 425]

United States District Court for the District of Oregon

PLAINTIFF'S NOTICE, UNDER PROTEST, RE SECOND CAUSE OF ACTION "DISCOVERY"

(Filed March 12, 1973; caption omitted in printing)

To Defendants and Their Local Counsel of Record:

Please Take Notice:

Pursuant to the restrictive and other orders of the Court, and under repeated protest that said restrictions on plaintiff's discovery concerning plaintiff's Second Cause of Action were and are prejudicial to plaintiff, plaintiff has taken limited depositions concerning the drug distribution practices of 14 alleged "non-profit" hospitals in Multnomah, Clackamas and Washington counties, State of Oregon.

Said limited discovery is materially incomplete, inadequate and misleading because of the limitations imposed by the Court:

(1) Plaintiff was forbidden to inquire concerning the drug prices, terms and conditions the defendants granted to the 14 alleged "non-profit" hospitals in competition with plaintiff's assignors and other community pharmacies in the tri-county area, but which the defendants did not grant to said assignors and other community pharmacies.

[R. 426]

(2) The Court repeatedly rejected plaintiff's efforts under the Federal Rules of Civil Procedure to place in the trial court file documents in the sole and exclusive possession of defendants relevant and material to the Second Cause of Action herein and the drug distribution practices of the 14 alleged "non-profit" hospitals in competition with plaintiff's assignors and other community pharmacies for the trade and custom of retail drug purchasers in Multnomah, Clackamas and Washington counties, Oregon;

(3) The Court repeatedly rejected plaintiff's efforts under the Federal Rules of Civil Procedure to take the depositions of officers, employees and agents of defendants in sole and exclusive possession of relevant and material personal knowledge concerning the drug distribution practices of the 14 alleged "non-profit" hospitals in competition with plaintiff's assignors and other community pharmacies for the trade and custom of retail drug purchasers in Multnomah, Clackamas and Washington counties, Oregon.

Had plaintiff been allowed to obtain such evidence, said evidence would have, in all likelihood:

(1) contradicted much of the "don't know" and other self-serving denials of knowledge, including but not limited to low "estimates" of the number of drug sales to the general public, in the testimony of various hospital officials deposed by plaintiff;

(2) contained substantial relevant and material evidence proving that the 14 alleged "non-profit" hospitals regularly and consistently sell prescription and other drugs in competition with plaintiff's assignors and other community pharmacies for the trade and custom of retail drug purchasers in Multnomah, Clackamas and Washington counties, Oregon;

(3) disclosed that various of the defendants herein were long aware, prior to filing of the complaint herein in 1971, that they were selling drugs at preferentially low prices to alleged "non-profit" hospitals which, in turn, resold said drugs in violation of the

[R. 427]

15 U.S.C. 13c limitation that said drugs were exclusively "for their own use;"

(4) supported the allegations of the AFFIDAVIT OF RAYMOND L. MONTEE RE HOSPITAL DRUG PURCHASES, executed November 10, 1972, and filed February 5, 1973 as part of the open trial court file.

This Notice is *not* to be construed as an admission by plaintiff that plaintiff's discovery as to drug distribution practices of the 14 alleged "non-profit" hospitals is complete or adequate or that the "evidence" is "undisputed" for purposes of defendants' pending motion for partial summary judgment or any other purpose.

Plaintiff's discovery is incomplete and inadequate

and therefore what is in the trial court file to date is misleading and in dispute.

NOW, THEREFORE, under protest, but pursuant to orders of the Court, plaintiff herewith notifies the Court and defendants that plaintiff has taken all of the depositions it is allowed to take concerning the drug distribution practices of the 14 alleged "non-profit" hospitals, and that this Notice does not constitute waiver of any of plaintiff's rights of discovery or any other rights under the applicable statutes and the Federal Rules of Civil Procedure.

DATED: March 12, 1973.

(Subscription and certificate of service omitted in printing)

[R. 384]

United States District Court for the District of Oregon

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON SECOND CAUSE OF ACTION

(Filed March 12, 1973; caption omitted in printing)

[R. 385]

Pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, defendants move for summary judgment in their favor on plaintiff's second cause of action on the ground that all transactions referred to therein are exempt from the Robinson-Patman Act under 15 U.S.C. § 13c, there is no genuine issue as to any material fact, and defendants are entitled to judgment as a matter of law.

(Subscription and certificate of service omitted in printing)

[R. 438]

United States District Court for the District of Oregon

PLAINTIFF'S RULE 56 AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION

(Filed March 20, 1973; caption omitted in printing)

STATE OF OREGON)
County of Multnomah) ss.

I, Henry Kane, being first duly sworn, depose and say:

1. I am one of the attorneys for plaintiff, am familiar with the records of this case, conducted all of plaintiff's depositions concerning what defendants term the "threshold" issue of drug distribution practices of alleged "nonprofit" hospitals, cross-examined the three witnesses whose depositions were taken by defendants, thoroughly examined the trial court file to determine whether the record to date is "ripe" for the Court to rule on defendants' motion for summary judgment on the Second Cause of Action herein, and pursuant to Rule 56(c), F.R.Civ.P., relating to service of opposing affidavits by the party in opposition, on behalf of plaintiff herewith by affidavit oppose defendants' motion for partial summary judgment on the Second Cause of Action, and base said opposition on the incomplete, inadequate and disputed trial court file upon which defendants purport to base their motion.

[R. 439]

2. In the interest of brevity your affiant incorporates by this reference all of plaintiff's motions, memoranda, affidavits and certificates relating to discovery and the Second Cause of Action, the Court's orders in response to plaintiff's attempts to make discovery, plaintiff's affidavits concerning drug distribution practices of the 14 alleged "nonprofit" hospitals, depositions taken by the parties and their accompanying exhibits, PLAINTIFF'S NOTICE, UNDER PROTEST, RE SECOND CAUSE OF ACTION "DISCOVERY," dated and filed March 12, 1973, and plaintiff's RULE 56 AFFIDAVIT OF HENRY KANE DISPUTING ACCURACY OF "CHARTS" DEFENDANTS SUBMITTED TO THE COURT, executed and filed on March 13, 1973.

3. In the light of:

(a) the huge gaps in the record concerning the Second Cause of Action;

(b) the Court's limitations on Second Cause of Action discovery and the consequences thereof;

(c) the fact that this is a Seventh Amendment jury case;

(d) the opposing inferences that may be drawn from the incomplete, disputed record to date;

(e) the hostile hospital witnesses deposed by

plaintiff whose economic interests and the economic interests of their hospital employers are adverse to plaintiff and the Second Cause of Action;

(f) the numerous disputes between plaintiff and defendants concerning what are the relevant and material facts, and

(g) lack of many of the as yet unknown relevant and material facts, granting of defendants' summary judgment motion would be untimely and improper, conflict with numerous decisions of the Supreme Court and the United States Court of Appeals for the Ninth Circuit, and would constitute reversible error.

4. There is no resolution, agreement or stipulation between plaintiff and defendants concerning the Second Cause of Action, which incorporates

[R. 440]

the allegations of the First Cause of Action. Defendants in their respective answers to the amended complaint, for example, deny the following relevant and material allegation:

> "38. Defendants, directly and indirectly, sell drugs to hospitals and other institutions not operated for profit on more favorable discounts, allowances, compensation, payments, services, brokerage, terms, facilities, rebates or lower prices than are available to plaintiff's assignors. * * *" (Am.Comp. 10, lines 15-19)

5. There is no resolution, agreement or stipulation between plaintiff and defendants concerning the following relevant and material allegation:

> "24. The exemption given sales to schools, colleges, universities, public libraries, churches, hospitals and charitable institutions not operated for profit by 52 Stat. 446, c. 283, 15 U.S.C. § 13c, where the drugs are employed for their own use, is limited to drugs used exclusively within the confines of the purchasing institution for enrolled patients of the institutions while such patients are so confined and for no other purpose." (Am. Comp. 8, lines 13-19)

6. Defendants have *not* filed any F.R.Civ.P. 56 affidavit alleging lack of dispute concerning any relevant and material fact. The closest to complying with the spirit of Rule 56 is an affidavit concerning a summary of some, *but not all*, of the depositions taken by the parties. Not summarized for purposes of the limited affidavit were the depositions of Kaiser organization representatives. For obvious reasons the deposition summaries submitted under affidavit by defendants do *not* include the depositions of the two persons who testified to forced drug sales and the depostion of RALPH G. SESSLER taken on December 22, 1972. Mr. Sessler, the former chief pharmacist at Portland Osteopathic Hospital, testified in part:

> "Q Did these drug sales, during the period that you were Chief Pharmacist at Portland Osteopathic Hospital include sale of drugs to a physician for use in his office?
>
> "A Yes." (Sessler dep. 8, lines 20-23)

7. Various of the hospital representative witnesses deposed by your affiant were obviously hostile to plaintiff, and such hostility

[R. 441]

was due in part to the realization that their testimony could led to filing of complaints against their hospitals. It would appear that some of the witnesses were aware that 15 U.S.C. § 13(f) provides:

> "(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce *or receive a discrimination in price* which is prohibited by this section." (emphasis supplied)

8. In addition, witnesses employed by Good Samaritan and St. Vincent Hospitals and the Kaiser organizations were represented by separate law firms that at the same time represent defendants herein.

9. One result of this double representation was that the attorney representing two defendants herein, whose firm also represented Good Samaritan Hospital, asked questions concerning documents that had not been placed in the record prior to defendants' cross-examination:

> "Q • • •
>
> "I am going to hand you a document and ask you whether it might refresh your recollection as to whether this policy relating to take home drugs for inpatients has been in effect for at least the last five years?
>
> "MR. KANE: Would you make that an ex-

hibit so we know what is being testified to?

"Whereupon the Reporter marked a 1 page document entitled Medications to Patients DEPOSITION EXHIBIT NO. 16 for identification.

"THE WITNESS: Would you repeat the question.

"Q (By MR. TRIPLETT:) I am referring to the brackets and will you read the question back?

• • •

"THE WITNESS: Yes, this particular policy on the dispensing of medications to patients, which is also from my green policy book and *I had forgotten* that item No. 9 refers to 'Inpatients leaving the hospital: • • •.'" (emphasis supplied) (Good Samaritan Alma A. Kaeser deposition, p. 47, lines 17-25; p. 48, lines 1-9)

10. Based on my familiarity with the deposition record, your affiant is of the considered belief that plaintiff would be able to, similarly,

[R. 442]

obtain "I had forgotten" answers from various hostile and evasive witnesses that would qualify, if not contradict, testimony on which defendants rely, were plaintiff allowed to depose defendants' employees concerning the Second Cause of Action and to obtain defendants' documents relevant to the Second Cause of Action. Even without such discovery, plaintiff was able to obtain amendments of prior testimony of David H. Fawkes, Emanuel Hospital Chief Pharmacist, concerning the sums the hospital charged the

State Public Welfare Division for drugs. See Fawkes deposition dated December 21, 1972, pp. 32-33.

11. This affidavit could be further lengthened by recitals of the disputes between the parties, based on the record, concerning relevant and material facts and the inferences and conclusions to be drawn therefrom. It is sufficient, it is submitted, to defeat defendants' motion for summary judgment on the Second Cause of Action simply to refer to the Raymond Montee affidavit, which contains evidence that Mr. Montee, as a "walk-in" member of the public purchased drugs from pharmacies of alleged "nonprofit" hospitals that sell the the [sic] general public, but whose representatives denied such sales or testified that such sales were limited or discouraged. Mr. Montee was not discouraged when he attempted to, and succeeded in his attempts to purchase prescription drugs from the following "nonprofit" hospitals:

Kaiser Foundation Hospital Pharmacy
St. Vincent Hospital and Medical Center Pharmacy
Dwyer Memorial Hospital Pharmacy
Gresham Community Hospital Pharmacy
Holladay Park Hospital Pharmacy
Portland Adventist Hospital Pharmacy
Willamette Falls Community Hospital Pharmacy
Willamette Methodist Convalescent Center
Woodland Park Hospital Pharmacy

12. Plaintiff filed the Montee affidavit on February 5, 1973, giving the defendants and each of them ample opportunity to depose Mr. Montee in an effort

to qualify or discredit his affidavit and the exhibits to his affidavit, *and* to take depositions of representatives of the above-listed hospital pharmacies in order to qualify or discredit the Montee affidavit and exhibits to said affidavit.

[R. 443]

13. Despite such opportunity, the defendants and each of them deliberately elected to allow the Montee affidavit and exhibits in all of their significance to become part of the trial court file without any attempt at challenge. In other words, the truth of the facts set forth in the Montee affidavit are accepted as true by the defendants and each of them.

14. For purposes of ruling on whether the Court has power to consider defendants' summary judgment motion, the Court must accept as established that the alleged "nonprofit" hospitals listed in the Montee affidavit:

(a) sell drugs to the general public—persons having no outpatient or other connection with the hospitals;

(b) sell drugs to the general public without any of the defensive, self-serving restrictions claimed for the listed hospitals by the deposition witnesses;

(c) have, through the testimony of their representatives, created numerous questions of disputed and relevant fact concerning

whether there are, in fact, any restrictions at all on drug sales to the public in competition with plaintiff's assignors and other community pharmacies.

15. Mr. Montee's affidavit related purchase of two prescriptions from the Holladay Park Hospital Pharmacy. Copies of the actual prescription labels and the Holladay Park Hospital Pharmacy cash receipt are Xerox-copied at page 11 of the Montee affidavit.

16. The two Holladay Park Hospital Pharmacy purchases alone create a disputed issue of material fact, for Mr. James Zeazas, Holladay Park Hospital Chief Pharmacist, testified as follows under oath on December 12, 1972:

"Q Do you have any written instructions or policies concerning who may receive drugs from your pharmacy?

"A No.

"Q Do you have any oral instructions?

[R. 444]

"A Yes, we have an oral policy.

"Q What is that, sir?

"A Well, primarily we sell only to inpatients and outpatients, employees and staff physicians, *only walk-ins, as you have referred to patients off the street, on an emergency basis.*"

"Q Have you personally ever refused to fill a legitimate prescription presented to you by a walk in?

"A Yes.

"Q When was the last such occasion?
"A Yesterday.
"Q What was the reason?
"A The reason?
"Q Yes.
"A Well, the reason primarily we don't have time. We cannot, between the three pharmacists routinely employed by the hospital, *we just don't have time to fill anything but inpatient and outpatient prescriptions.*" (emphasis supplied) (Zeazas dep. 6, lines 5-25; p. 7, line 1)

17. Only Kaiser admits sales to the general public without any restriction, and this policy is admitted by defendants in their memorandum at page 21.

18. The numerous evidentiary conflicts between the Montee affidavit and the deposition testimony, of which the above-quoted Zeazas excerpt is a typical example, are evidentiary questions for the jury after study of the demeanor of the witnesses under examination and cross-examination and, perhaps, examination by the Court, taking into account evidence of the financial incentive of the hospitals listed in the Montee affidavit to sell drugs, at a huge profit, to the general public.

19. Defendants have not seen fit in their incomplete "charts submitted to the Court on February 28, 1973, to total the drug sales and profits of the alleged "nonprofit" hospitals. Defendants have in their possession plaintiff's statistical data drawn from the depositions and exhibits that reflect the following, incomplete data:

[R. 445]

Total Drug Sales	$32,792,997
Drug Net Income	$10,155,165

20. In addition, plaintiff's computation of the percentage of profit per hospital on total reported drug sales for the periods for which data was produced disclose the following percentages:

Dwyer Memorial Hospital	42.84 percent
Emanuel Hospital	41.24 percent
Good Samaritan Hospital	44.49 percent
Gresham Hospital	60.53 percent
Bess Kaiser and related Permanente clinics	35.78 percent
Holladay Park Hospital	40.78 percent
Physicians & Surgeons Hospital	37.04 percent
Portland Adventist Hospital	38.73 percent
Portland Osteopathic Hospital	28.80 percent
Providence Hospital	36.89 percent
St. Vincent Hospital	43.00 percent
Tuality Hospital	44.22 percent
Willamette Falls Hospital	not given
Willamette Methodist Center	9.85 percent

21. The above-noted huge profits were achieved despite the fact that the hospitals sold drugs at very favorable subsidized levels to employees and physicians and the charging of "overhead" such as pro rata shares of losses from charity and cafeteria operation to drug sales.

22. Defendants' memorandum at page 18 attempts to leave the impression with the Court that Kaiser's drug prices are low, without, of course, making such a claim.

23. Any such impression is contradicted by Greenlick deposition exhibit no. 2, dated November 7, 1972:

[R. 446]

"A reassessment of the dispensing fee may be in order, particularly in view of changes in the community pharmacy pricing structure. The initiation of Phase II of President Nixon's wage and price controls resulted in the public disclosure of prescription prices. * * *

(no paragraph)

As a result, *the Kaiser claim of 'reduced' prescription prices to Health Plan members has less validity.*

(no paragraph)

When compared to independent community pharmacies, Kaiser prescription charges still appear to be substantially lower.

(no paragraph)

But Kaiser rates appear to be very comparable and sometimes higher than those charged by the 'discount' type pharmacies * * *.

(no paragraph)

These changes would appear to have a detrimental effect on the Kaiser pharmacy capture rate. * * *" (emphasis supplied) (Greenlick ex. 2-11)

24. And any such impression is further contradicted by Greenlick deposition exhibit no. 4-55, which confirmed profits much greater than those earned by community pharmacies:

"However, it was reported in the *Kaiser Medical Entities Regional Economic Analysis Report* that pharmacy net revenue as a per cent of sales for the Oregon Region in 1968 was slightly over 20 per cent. This would indicate that more than $0.60 per prescription was net profit. Both the percentage and amount are substantially higher when compared to general community drug distribution systems.

(no paragraph)

Independent retail pharmacies of similar size whose prescription income was over 75 per cent of sales reported that net profits were 7.7 per cent of sales. The average net revenue per prescription dispensed was $0.36, which was 60 per cent of that reported by Kaiser pharmacies." (emphasis supplied) (footnotes omitted)

[R. 447]

25. No citation of authority is required for the principle that long-standing interpretation of a statute by an administrative agency, although not binding on the courts, is persuasive. It is therefore significant for purposes of defendants' motion that Scott Deposition Exhibit No. 17E ruled that Kaiser's pharmacy income was considered taxable:

"During 1966 the Internal Revenue Service filed notices of proposed assessments of additional federal taxes on income aggregating approximately $1,400,000 for the three years ended December 31, 1965, against three unconsolidated service subsidiaries which are 50% owned by the Kaiser Foundation Health Plan.

(no paragraph)

The proposed assessments, which involve determination of net income from pharmacy operations, are being contested by the service subsidiaries on advice of legal counsel. * * *"

26. Defendants' lengthy but irrelevant apologia for Kaiser does not cancel out the fact that Kaiser, after conferences with the U. S. Internal Revenue Service and on the advice of its counsel, agreed to pay, and has continued to pay federal income taxes on millions of dollars in drug sales. Scott Deposition Exhibit numbers 27 through 27D reflects the calculation of taxable income on $309,585.33 in Oregon drug sales classified as "Member outpatient and casual pharmacy services." Defendants also have not referred to the evidence that Willamette Methodist Convalescent Center pays federal income taxes on certain drug sales despite its "nonprofit" status.

27. Defendants attempt to downgrade the significance of the fact that Permanente Services of Oregon, Inc., a private, *for profit* corporation under Oregon law, obtains drugs from Bess Kaiser Hospital and pays income taxes on its revenue.

28. The October 20, 1972 Scott deposition discloses that Bess Kaiser Hospital Pharmacy provides drugs for the office use of physicians in private practice as partners and employees of Permanente Clinic, a private, for profit, partnership:

[R. 448]

"Q Well, is Permanente Services of Oregon, Inc. providing any goods or services or facilities to the Permanente Clinic?

"A Yes.

"Q What would that be?

"A To the extent that an individual physician, his practice requires maintaining *a supply of pharmaceuticals for his office purposes, those drugs would be provided at locations other than Bess Kaiser Hospital by Permanente Services.*" (Scott dep. 27, lines 1-10) (emphasis supplied)

28. Permanente Services of Oregon, Inc., a private for profit corporation, purchases its drugs from Kaiser Foundation Hospitals, operator of the Bess Kaiser Hospital Pharmacy:

"Q Does Permanente Services of Oregon, Inc. purchase drugs to be distributed—from manufacturers to be distributed in the Kaiser Hospital Pharmacy?

"A Permanente Service does not purchase drugs from manufacturers.

"Q Who does?

"A Kaiser Foundation Hospitals.

"Q And then does Kaiser Foundation Hospitals transfer those drugs in some manner of bookkeeping entry to Permanente Services of Oregon, Inc.?

"A *To reflect a purchase by Permanente Services of Oregon, Inc. from hospitals.*" (emphasis supplied) (Scott dep. p. 16, lines 21-25; p. 17, lines 1-7)

29. Scott Deposition No. 17B, under "Notes to Financial Statements," implies that net profits are paid to private corporations such as Permanente Services of Oregon, Inc., and, in addition, to physicians as providers of medical services:

> "Health Plan contracts with groups of physicians and Kaiser Foundation Hospitals to provide medical and hospital care to its members. * * *
>
> *"The balance of its income is distributed to the providers of medical and hospital services in accordance with the terms of the contracts between Health Plan and the providers of such services."* (emphasis supplied)

[R. 449]

30. Plaintiff's subpoena called for the articles of incorporation, *inter alia*, of the Permanente Clinic, but what was described as the articles of partnership were not produced:

> "Q (BY MR. KANE:) Now, what is, according to my notes, Permanente Clinic?
>
> "A The Permanente Clinic is a partnership of physicians doing business in the states of Oregon and Washington.
>
> "Q Do you have the Articles of Incorporation of that?
>
> "A The Articles of Partnership, I do not have those with me at the moment, Mr. Kane." (Scott dep. 6, lines 19-23)

31. Defendants' memorandum, at page 7, by its quotation of the articles of incorporation of a Kaiser

subsidiary, implies that Kaiser does not divert assets. The prohibition quoted at page 7 of the memorandum, significantly, is *not* found in the Articles of Incorporation of Kaiser Foundation Hospitals or the Articles of Incorporation of Kaiser Foundation Health Plan of Oregon. The quotation is misleading.

32. Scott Deposition Exhibit No. 17E discloses that Kaiser revenue is used to finance, from membership and other foundation revenue, what appear to be generous pensions for Permanente Clinic physicians "in the practice of medicine for personal gain:"

> "In 1959 Kaiser Foundation Health Plan, Inc. adopted retirement plans for the benefit of physicians serving Health Plan members. * * *
>
> "Retirement plan expense for 1966 was $1,952,000. * * *"

33. Scott Deposition Exhibit No. 17 discloses that pension costs for physicians and presumably others affiliated with the Kaiser organization have increased:

> "The organizations have pension plans covering certain employees. The total pension expense for 1971 and 1970 was $2,340,700 and $1,795 * * *." [sic]

[R. 450]

34. Defendants place undue reliance on the articles of incorporation they have made an exhibit to their memorandum, implying that the Court must accept their recitals as true and may not look behind the recitals to determine whether the provisions were followed.

35. Defendants therefore err in claiming that "these exhibits establish as a matter of law that the hospitals are not operating for profit within the meaning of Section 13c" because any such allegation is rebuttable. Numerous "nonprofit" corporations have been found to be commercial, not "nonprofit." Defendants also ignore the fact that under the federal tax exemption laws an organization may have a tax exemption as a "nonprofit" organization and still be required, as was Kaiser, to pay federal income taxes on income from activities—outpatient and walk in drug sales—outside the scope of the "nonprofit" tax exemption.

36. Your affiant, therefore, denies that the articles of incorporation made an exhibit to defendants' memorandum are adhered to or are conclusive in and of themselves. In support of this allegation of a disputed, relevant and material issue of fact your affiant cites the following passage from the December 14, 1972 Scott deposition:

> "Q Now Exhibit 8, the Articles of Incorporation of Permanente Services of Oregon, Inc., identified at your prior deposition, states at page 3, and I quote, 'In keeping with the primary objectives of this corporation, the net earnings of this corporation shall be limited to and shall not exceed a reasonable return, in no event exceeding 10 percent per annum on the capital invested in the conduct of the business of this corporation.'
>
> Has this been amended to allow for the 17.5 percent figure set forth in Exhibit No. 19?

> Your Articles of Incorporation refer to return of in no event exceeding 10 percent per annum on the capital invested in the conduct of the business of this corporation, which is Permanente Services of Oregon, Inc.
>
> [R. 451]
>
> This Exhibit No. 19, refers, if I read it correctly, 17.5 percent. Now, has No. 8 been amended to allow a return of that 17.5 percent?
>
> "A I am not involved in developing or maintaining the Articles of Incorporation. I am not aware of that.
>
> "Q All right. Has the return actually paid up to that maximum of 17.5 percent?
>
> "A It has been paying it, yes, for the years since this Service Agreement has been entered into." (Scott dep. p. 41, lines 10-25; p. 42, lines 1-7)

In other words, despite the provision limiting the return to 10 percent, Kaiser consistently ignored the limitation and returned 17.5 percent.

37. Because of the Court's refusal to allow plaintiff to make discovery of evidence in the sole possession of defendants concerning the drug distribution practices of the 14 alleged "nonprofit" hospitals, plaintiff has been unable to determine whether there have been other violations of the Articles of Incorporation relied upon by defendants.

38. There is an issue of relevant and material fact concerning defendants' claim at page 6 of their mem-

orandum that the status of Permanente Services of Oregon, Inc., an Oregon for profit corporation, "has no independent significance to the present motion," because the private corporation is a separate legal entity as a matter of law and fact and pays federal income tax returns on its income.

39. There is an issue of relevant and material fact concerning defendants' claim at page 6 of their memorandum that the receipts of Permanente Services of Oregon, Inc., an Oregon for profit corporation, "are the property of Health Plan" for the following reasons: the private corporation is a separate legal entity as a matter of law and fact, its records are maintained separately and Mr. Scott, the Controller, used the term purchases in describing transfers of drugs to the clinics.

[R. 452]

See paragraph 28 of this affidavit, supra, at page 11, lines 9-22. In addition, if net profits include "receipts," the evidence is that Permanente Services of Oregon, Inc., the for profit corporation, retains the profits:

> "Q What happens to your profits after taxes for Permanente Services of Oregon, Inc.?
>
> "MR. ELLIS: You are referring to the net income figure?
>
> "MR. KANE: Yes, after taxes.
>
> "THE WITNESS: It is reflected in the net worth section of the Balance Sheet of Permanente Services.

> "Q Well, are any dividends distributed to anyone?
>
> "A No.
>
> • • •
>
> "Q Have any dividends ever been distributed?
>
> "A No, not to my knowledge.
>
> "Q What is the total paid in capital, according to your records now then for Permanente Services of Oregon, Inc.?
>
> "A $50,000.
>
> "MR. DUNN: What is the Fifty?
>
> "THE WITNESS: Common stock.
>
> "MR. PHELAN: That is the invested capital. Do you want the total capital?
>
> "MR. KANE: Yes, the total capital as shown by your latest records.
>
> "THE WITNESS: Which would include retained earnings and stock?
>
> "Q Everything.
>
> "A Combination of the two, $205,227 as of December 31, 1971.
>
> "Q What was the initial paid in capital?
>
> "A Common stock of $50,000.

[R. 453]

> "Q So, the difference between $50,000 and $205,000 is the —
>
> "A (Interposing) Retained earnings of $155,-227." (October 20, 1972 Scott dep., p. 22, lines 9-25, p. 23, lines 1-21)

If the receipts did, in fact, belong to another organization, Permanente Services of Oregon, Inc., would have no taxable income. The above excerpt, however, estab-

lishes substantial retained earnings, and the same deposition, at pages 11-12, establishes that Permanente Services of Oregon, Inc. had income of $1,062,539 in calendar 1971, net income of $31,220 before taxes, and paid $8,485 federal taxes, $1,600 State of Oregon taxes and a $100 franchise tax to the State of California. Despite the defendants' efforts to obscure the facts, the two corporations are separate and are treated separately and therefore Kaiser and the defendants are bound by the deliberate choice of Kaiser to do business as it has done.

As noted in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-142 (1968):

> "There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy.
>
> (no paragraph)
>
> But *since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities.*" (emphasis added)

40. There is an issue of relevant and material fact concerning defendants' claim at page 6 of their memorandum that "PSO's operation of the pharmacies in the satellite clinics is nominal, and it is no more than a department of the Kaiser program." That allegation

is contradicted by the following excerpt from the October 20, 1972 Scott deposition:

[R. 454]

"Q • • • Is Permanente Services of Oregon, Inc. an administrative body of any kind?

"A No, it is not.

"Q What is it then?

"A Permanente Services of Oregon, Inc. provides pharmacy and optical supply services to members of the Kaiser Foundation Health Plan.

"Q Does it provide any other services?

"A No.

"Q Does it operate the pharmacy in the Bess Kaiser Hospital?

"A No, it does not.

"Q Does it operate any of the Kaiser Clinics?

"A *It operates what you refer to as Kaiser Pharmacies—those in the State of Oregon, other than those located at Bess Kaiser Hospital.*

"Q In other words, the various clinics that have been testified to by Mr. Pirtle as being under his supervision are operated by the Permanente Services of Oregon, Inc.?

"A *That is correct.*" (emphasis supplied) Scott dep. 7, lines 6-25; p. 8, line 1)

41. There is an issue of relevant and material fact concerning defendants' claim at page 10 of their memorandum that the volume of purely retail drug sales to members of the public—the casual or "walk-in" customers is *de minimus* [sic], occurring primarily in cases, they allege, of "emergency" and "hard-

ship." The witnesses, for reasons previously related, kept their "estimates" as low as possible, but such "estimates" are doubtful in view of their personal interest in the outcome of this phase of the litigation and are further doubtful because of the ease with which plaintiff's investigator, purchased prescription and other drugs as a casual customer without any claim of "hardship," "emergency" or other representation that would have changed the status of his purchase. Assuming, but not conceding, that

[R. 455]

that [sic] the "estimates" are relatively accurate, such continuous and regular sales are substantial as a matter of fact and as a matter of law. The issue is whether sales are made, not the number of such sales. And defendants pointedly ignore the fact that the sales are made in competition with plaintiff's assignors and other community pharmacies. Defendants also ignore the fact that the Kaiser organization makes such sales without any restriction and those sales are substantial. Scott Deposition Exhibit No. 30 states at page 3 of the "Accounting Policy" manual pertaining to pharmacy:

> "On the advice of our Legal Department, the corporation is filing both State and Federal unrelated business income tax returns. * * *"

The October 20, 1972 Scott deposition, which was not summarized by defendants and filed as an exhibit, established that Kaiser reports an ever increasing

amount of drug revenue from drug sales not covered by its "nonprofit" exemption.

In 1971 Kaiser reported gross receipts of $10,561,-398.

In 1970 Kaiser reported gross receipts of $8,769,-851.

In 1969 Kaiser reported gross receipts of $7,057,-902.

In 1968 Kaiser reported gross receipts of $4,959,-008.

In four calendar years Kaiser reported gross receipts totaling *$31,848,159* from drug sales outside the "nonprofit" organization tax exemption. And Kaiser paid federal income taxes on that revenue.

Even if only ten percent of the above total represented "walk-in" sales, the percentage is equal to $3.1 million!

42. There is an issue of relevant and material fact concerning defendants' claim that nearly 90 percent of the drugs are dispensed to "inpatients." Besides being incorrect, the statistic does not take into account the much greater casual sales of the Kaiser group. Many of the so-called "inpatient" sales include so-called "take-home" drugs that are charged to the patient's bill, but are for use following his or her discharge from the hospital, and include forced sales over

[R. 456]

protests and against the wishes of the recipients. See the Carlston and Pye depositions. Both represented forced, involuntary sales of drugs for use following discharge of the patient.

43. There is an issue of relevant and material fact concerning defendants' allegation at page 10 of their memorandum that the hospital drug sales are used primarily for the "acutely ill." At best that is simplistic, for as a general proposition only a fraction of the hospitalized are "acutely" or "seriously" or "critically" ill. Indeed, much of the drugs are in the nature of "maintenance of health" drugs, e.g., vitamins, routine pain pills, etc. It is questionable whether birth control pills are for the "acutely ill." A noticeable percentage of so-called "inpatient" drug sales represent sales of drugs to be consumed following discharge from the hospital. The users would not be discharged, presumably, if they were "acutely ill."

44. There is an issue of relevant and material fact concerning defendants' allegation at page 10 of their memorandum that the hospitals make no effort to sell drugs to the public by advertising or other promotion. Such hospitals promote the sale of their drugs for the considerable profits earned by encouraging the sale, *inter alia*, of "take-home" drugs to be used following discharge from the hospital.

45. There is an issue of relevant and material fact concerning defendants' allegation at page 11 of their memorandum that the drug distribution policies

are designed "to avoid competition with community pharmacies." Defendants ignore the Kaiser policy, of course, to sell to all buyers. Plaintiff subpoenaed written policy statements on the subject, but the alleged non-competition policies appear to be oral policies and in a number of instances are contradicted by the Montee affidavit. Moreover, sales to outpatients and other persons not hospitalized "inpatients," employees and their families, and doctors and their families constitute competition with community pharmacies. It is ridiculous to claim that the hospitals don't compete for drug sales when, in fact, they offer advantageous low, subsidized prices

[R. 457]

that the community pharmacy cannot meet. Were plaintiff allowed by the Court to make the hospital price discovery plaintiff insists is vital for proper understanding and evaluation of the Second Cause of Action and the pending motion, it would be quite manifest that the hospitals successfully and deliberately compete with community pharmacies for the retail trade of the public and the hospitals' employees, physicians, students and volunteers and their families. Because the hospitals offer prices substantially lower than the prices that can be charged by the community pharmacies, which pay the full, unsubsidized price, the hospitals are quite successful competitors, as evidenced by their substantial sales to employees, physicians and others. Sometimes the favored employees, physicians and their families pay less for a drug

than the price the drug manufacturer charges the community pharmacy. One example of competition with a community pharmacy that is one of plaintiff's assignors is contained in the AFFIDAVIT OF LOGAN WALLACE RE REFILLING OF PRIVATE DOCTOR'S OFFICE PRESCRIPTION BY PORTLAND ADVENTIST HOSPITAL, executed February 24, 1973. Another example of such competition is contained in the AFFIDAVIT OF LOGAN WALLACE RE REFILLING OF PRIVATE DOCTOR'S OFFICE PRESCRIPTION BY EMANUEL HOSPITAL PHARMACY, executed December 30, 1972. Other examples of successful taking away of drug business from a community pharmacy are exhibits 13 and 14 to the December 7, 1972, deposition of Henry Wong, Providence Hospital Chief Pharmacist.

Deposition exhibit no. 13 states:

"TO WHOM IT MAY CONCERN:

"Please do not accept any more prescriptions for Vera Narveson at Bel Air Convalescent Home as both my husband and I work at Providence Hospital and can get our prescriptions filled at a very good discount.

"Guess the nurses at Bel Air didn't understand the instructions when we brought Mother to Bel Air for care.

"Thank you so very much, but I just can't see paying the full price when we can get a discount especially when her medicines run very high. Thank you so very much.

[R. 458]

Sincerely,

/s/ Mrs. Rhymer (Avis)"

Deposition Exhibit No. 14 states:

"TO WHOM IT MAY CONCERN:

"Please continue to issue the GLYSENNID TABLETS whenever necessary to Bel Air Convalescent Home, 11850 S. W. Allen Blvd., Beaverton, Oregon. for Vera Narveson as these I can't get through Providence Hospital Pharmacy. They do not carry them.

"Thank you very much.

/s/ Mrs. C. Rhymer
(Her Daughter)"

46. There is an issue of relevant and material fact concerning defendants' allegation at page 11 of their memorandum that "Most of the hospital pharmacies are located in areas not easily accessible to the public." I categorically deny that said allegation is true; certainly plaintiff's representative, Raymond Montee, experienced no access difficulties when he purchased drugs from various hospital pharmacies. Not one of the witnesses examined and cross-examined on the "access" issue said their hospital pharmacy was inaccessible, or barred to the public, or difficult to locate. None said that a hospital employee would refuse an inquiry as to the location of the pharmacy. All of the pharmacies were in the "public" parts of the hospital, as distinct from areas restricted to employees and

physicians such as laboratories. Some of the hospital pharmacies are quite readily accessible. The Bess Kaiser Hospital Pharmacy, for example, occupies a highly visible location in the main hospital lobby a short distance from the entrance to the lobby. It is difficult, if not impossible, to avoid seeing the pharmacy. See, for example, Zeazas Deposition Exhibit No. 18. It is a sketch of the Holladay Park Hospital lobby showing the pharmacy to be located five feet from the lobby entrance. The Zeazas deposition states at page 40, lines 10-18, with respect to Exhibit No. 18:

[R. 459]

"Q With that as north, the entrance is north, so, therefore, the pharmacy then is at the east of that main entrance?

"A That is right.

"Q About how many feet from the main entrance is the pharmacy?

"A Just a few feet, five feet.

"Q Five feet from your main entrance?

"A Yes."

47. There is an issue of relevant and material fact concerning defendants' allegation at page 11 of their memorandum that drug sales to "walk-ins," persons having no association with the hospital, are forbidden or discouraged and are characteristically limited to cases of immediate need or emergency, as in the evenings and on weekends when community pharmacies are closed, and the alleged "policy" is enforced by requiring customers who are not known to

the pharmacist to identify themselves or the family member for whom a drug is purchased. I categorically deny that said allegations are true, and cite in support of said denial the unchallenged Montee affidavit, the fact that the hospital pharmacies do sell to the casual public and the further admitted fact that Bess Kaiser Hospital sells without any restrictions whatsoever.

48. There is an issue of relevant and material fact concerning defendants' allegation at page 11 of their memorandum that the volume of walk-in business is negligible and is less than one percent of total drug sales. I categorically deny that said allegations are true, and cite in support of said denial that assuming but not conceding that "walk-in" sales are less than one per cent of total drug sales, even one percent of the $32,792,997 in drug sales in the record is significant, and the figure is much higher when Kaiser's sales without restriction at its hospital pharmacy and *five* Permanente Clinic pharmacies are taken into consideration. See, for example, Exhibit No. 3 to the March 6, 1973 deposition of Robert C. Wiggin, Lincoln

[R. 460]

National Life Insurance Company Claim Manager, which evidence a total of *2,071* Kaiser prescriptions and 13 Willamette Community Hospital prescriptions. See Wiggin Deposition No. 4—EILEEN CUMMINS AFFIDAVIT RE RETAIL CLERKS UNION, LOCAL 1092, PRESCRIPTION DRUG PURCHASES

FROM KAISER HOSPITAL AND RELATED CLINIC PHARMACIES AND WILLAMETTE COMMUNITY HOSPITAL. By definition, none of the Kaiser prescriptions are "inpatient" hospital drug orders. Instead, they are purchases by casual "walk-in" members of the public — members of Retail Clerks Union, Local 1092 and their families. The Kaiser sales were "captive" sales because the union local required its members to purchase prescription drugs from Kaiser and other "participating" pharmacies (see Wiggin Deposition Exhibit No. 2, the Wiggin deposition, the January 3, 1973, deposition of Gordon Swope, President of Retail Clerks Union Local 1092, and the deposition taken January 12, 1973 of William C. Earhart, who administers the agreement between the union and the insurance company) if they desired to be reimbursed for 80 percent of the cost of said prescriptions. Of course they desired to be so reimbursed and therefore purchased their prescriptions from Kaiser and other "participating" pharmacies.

49. There is an issue of relevant and material fact concerning defendants' allegation at page 11 of their memorandum that "walk-in" sales are minimal. I categorically deny that allegation. The "estimates" lack foundation and are suspect, at best, because they were self-serving to protect the hospitals from possible lawsuits for violation of the Robinson-Patman Act. The weight, if any, to be given the unreasonably low estimates is a question for the jury after the jury has observed the demeanor of the witnesses under examination and cross-examination. Assuming but not conceding that "walk-in" sales are minimal, what is relevant for purposes of this litigation is that "walk-in" drug sales occurred over a period of years throughout the metropolitan area of Portland.

50. There is an issue of relevant and material fact concerning

[R. 461]

exclusion from defendants' allegations at page 11 of their memorandu, [sic] of the cash register computed "walk-in" drug sales reported by Kaiser for the period March 1, 1970 to September 30, 1972. Pirtle Deposition Exhibit No. 2 lists a total of *6055* "non-member," that is, "walk-in" drug sales, for the 30-month period ending September 30, 1972. That number is more than "minimal," to say the least.

50. There is an issue of relevant and material fact concerning defendants' allegation at page 11 of their memorandum that none of the hospitals "supply other markets." I categorically deny that allegation on the evidence in the record that Bess Kaiser Hospital ships drugs it receives at its receiving facility to destinations out of the State of Oregon. By definition, a market outside of this state is another market.

Counsel for defendant William H. Rorer, Inc. and counsel for the Kaiser Foundation objected to plaintiff's efforts to determine whether Kaiser Hospital in Portland shipped drugs from Portland to the State of California:

"MR. PHELAN: Before we were apprised of Mr. Ellis's representation of one of the defendants with respect to distribution of drugs, I think he has answered with respect to distribution of drugs within this area. He would certainly answer those questions, but as far as distribution outside of this area, we would ask him not to answer because we think it is outside of the scope of your examination and of the case.

"Q (BY MR. KANE:) All right, let's make a record.

Are you shipping drugs into the State of California?

"MR. PHELAN: Don't answer.

"MR. KANE: All right.

"MR. TRIPLETT: I will join in the objection.

"MR. KANE: Let the record show that the witness refused to answer on advice of counsel." (Pirtle dep. 37, lines 1-18)

The Court denied plaintiff's motion to overrule the above objection:

[R. 462]

"6. Paragraph (2) of plaintiff's motion, dated October 27, 1972, for an Order that Mr. Roscoe Pirtle, Chief Pharmacist, Bess Kaiser Hospital, shall answer fully and completely plaintiff's deposition questions concerning distribution of drugs from said hospital, including but not limited to whether drugs are shipped from said hospital to delivery points in the State of California, and shall produce documents called for pursuant to any Subpoena Duces Tecum relating to such

distribution, is denied, except as allowed in Paragraph 2 of this Order." (AMENDED ORDER dated December 8, 1972)

The trial court file confirms the issue of disputed relevant fact.

51. There is an issue of relevant and material fact concerning defendants' allegations at pages 11-12 of their memorandum that none of the hospitals purchase drugs for, or distribute them to, clinics or other hospitals or pharmacies "and only if a drug is needed in an emergency for immediate use will any hospital lend or sell drugs (usually at cost) to such institutions (App. 6)." I categorically deny said allegations.

The Bess Kaiser Hospital sells drugs to the Permanente *Clinic*, a for personal gain partnership of some 130 physicians practicing in the Portland area. See page 11, lines 1-22, of this affidavit, supra, re purchases of drugs by the Permanente Clinic from the Kaiser Foundation Hospitals, and paragraph 50 of this affidavit, supra.

52. There is an issue of relevant and material fact concerning defendants' allegations at page 12 of their memorandum that sales to staff physicians are small in amount and that the record shows no significant distribution of drugs to doctors' offices. I categorically deny said allegations. What is significant is that such sales occur and the record is barren concerning any prohibitions on sale of drugs to physicians for distribution and resale by the favored physicians. At Portland Osteopathic Hospital, for example, for

the ten months ending October 31, 1972 the hospital sold drugs for $4,134.54 to staff physicians, according to Matlick Deposition Exhibit No. 5. The Dwyer Memorial Hospital physician figure total was an estimated $2,000 for

[R. 463]

for the period ending June 30, 1972 (Lindley Ex. No. 3). Other hospitals, e.g., Emanuel Hospital and Physicians and Surgeons Hospital, include sales to physicians in the statistical data designated sales to hospital employees. The Emanuel Hospital Chief Pharmacist testified:

"BY MR. VAVROSKY:

"Q Mr. Fawkes, we have discussed the percentage breakdown of sales of drugs by the pharmacy. I understand that over 91% of your drugs are administered to inpatients in the hospital.

"A Yes.

"Q And of less than nine per cent, approximately half of those are administered to both employees and their families and staff physicians and their families, is that correct?

"A Well, half of the nine percent to employees and physicians, yes." (Fawkes dep. p. 26, lines 9-20)

Assuming the above-quoted estimates are correct, sales to physicians are more than nominal because Emanuel Hospital reported drug sales totaling *$5,114,964* for the discovery period ending November 1, 1972. Further assuming that the above estimates

are correct and that sales to physicians were half the 4½% estimate for doctors and employees, drug sales to physicians were in the neighborhood of $20,000, a not inconsiderable sum for but one of 14 alleged "non-profit" hospitals.

Physicians have every incentive to purchase their drugs for office use through the hospitals because of the difference in price between purchase from the manufacturer or wholesaler at the full, unsubsidized price and the much lower price of the hospital charged by the hospitals after sweetening the incentive with generous physician's discounts.

Mr. Ralph G. Sessler, former Portland Osteopathic Hospital Chief Pharmacist, testified of hospital drug sales to physicians for office use:

"Q During this period did you sell drugs to physicians?

"A Yes.

"Q Were there any restrictions on drugs sold to physicians?

[R. 464]

"A Our administrator was trying to cut that out, but there was no restrictions, no.

"Q Did these drug sales, during that period that you were Chief Pharmacist at Portland Osteopathic Hospital include sale of drugs to a physician for use in his office?

"A Yes.

"Q Did you receive any instructions or orders from your superiors concerning such drug sales to physicians for their office use?

"A There was no negative considerations if they made efforts to keep their bill paid through the office. If they fell behind in their bill in the office then he would tell me to remind them to pay the bill.

* * *

"Q Can you give me some idea of the quantity of any of those physician office use drug orders?

"A This would be a long time to recollect. There was one physician, and I don't recall his name, who quite often used our pharmacy even for shipments in from drug companies and I would have to walk around and work in there and maybe he wouldn't pick them up for three or four or five days. How that was billed or whether it had anything to do with the hospital billing, I couldn't say.

Most of the orders which I received were not significant, they would receive direct, but on occasion I had belief to think that maybe some of these things were drop shipped to the physician.

"Q What do you mean by drop shipped?

"A Well, in other words, the salesman would approach a doctor for an order and he might submit it through the hospital. * * *" (Sessler dep. p. 8, lines 14-25; p. 9, lines 1-25; p. 10, lines 1-2)

Mr. Sessler testified as follows on cross-examination:

"Q There was no effort on the part of anyone so far as you know to conceal anything about prescriptions?

"A No, no, there was no effort. In fact, you see in the original Osteopathic Hospital was a small hospital in the city and they had

a hard time getting started. There were a few doctors and *the doctors were encouraged to make as many purchases as they could through the pharmacy to offset costs.*" (emphasis supplied) (Sessler dep. 18, lines 15-25; p. 19, line 1)

There is, therefore, uncontradicted evidence in the record that various drug manufacturers made "drop shipments" to physicians through the hospital. The records of physician sales through the alleged "nonprofit" hospitals are in the possession of the defendants, and denial of discovery as to such preferential sales precludes granting of the motion for summary judgment on the Second Cause of Action.

53. There is an issue of relevant and material fact concerning defendants' allegations at page 12 of their memorandum concerning preferential sales to employees, students and staff physicians as assisting the hospitals in the effective fulfillment of their purposes. I categorically deny said allegations and assuming, but not conceding the allegations are true, they are irrelevant to the issue of whether the alleged "nonprofit" hospitals are selling drugs at retail to persons other than hospitalized inpatients in competition with plaintiff's assignors and other community pharmacies. I fail to see how such practices enable a physician to do a better job for his hospitalized inpatients. Indeed, I would question the dedication of a physician who would send patients to the hospital which gave him the best "drug deal." Plaintiff would

have no quarrel with employee "fringe benefits" were those benefits based on drugs purchased by the hospitals at the same acquisition cost paid by community pharmacies. Moreover, there is no evidence in the record, let alone any affidavit, that preferential drug prices to employees and physicians promote job affiliation and performance. A hospital employee is competent or is not competent. Whether he or she purchases drugs at half the price she would have to pay for the same drug at a community pharmacy is irrelevant to that employee's level of competence and job performance. And good motives is not a defense to violation of the antitrust laws [sic].

[R. 466]

See:

United States v. *Topco Associates, Inc.*, 405 US 596, 610-611 (1972)
Albrecht v. *Herald Company*, 390 US 145, 154 (1964)
United States v. *General Motors Corp.*, 384 US 127, 146-147 (1966)
United States v. *McKesson and Robbins, Inc.*, 351 US 305, 310 (1956)
United States v. *National Association of Real Estate Boards*, 339 US 485, 488-489 (1950)
United States v. *United States Gypsum Co.*, 333 US 364, 393 (1948)
Associated Press v. *United States*, 326 US 1, 16, n. 15 (1945)
Fashion Originators' Guild of America v. *Federal Trade Commisison*, 312 US 457, 468 (1941)

United States v. *Socony-Vacuum Oil Co.*, 310 US 150, 218 (1940)
Sugar Institute, Inc. v. *United States*, 297 US 553, 599 (1936)
Paramount Famous Lasky Corporation v. *United States*, 282 US 30, 44 (1930)
Standard Sanitary Manufacturing Company v. *United States*, 226 US 20, 49 (1912)
Washington State Bowling Proprietors Association v. *Pacific Lanes, Inc.*, 356 F2d 371, 376 (9th Cir. 1966), cert. den. 384 US 363
United States v. *Hilton Corp.*, 467 F2d 1000 (9th Cir. 1972) cert. den., Jan. 15, 1973

54. There is an issue of relevant and material fact concerning defendants' allegations at page 12 of their memorandum, unsupported by any reference to the record, that none of the hospitals divert drugs in commercial redistribution in competition with plaintiff's members. I deny the allegation on grounds that such diversion is an industry problem and that the record is blank on the subject of diversion with the exception of allegations of diversion by unidentified proprietary hospitals in PLAINTIFF'S EXCERPTS FROM DEFENDANT A. H. ROBINS COMPANY, INC. TESTIMONY RE DRUG PRICE AND PRACTICE DISCRIMINATION AGAINST COMMUNITY PHARMACIES, dated and filed February 28, 1973. This is another example of evidence in the sole possession of the defendants that should be the subject of complete discovery prior to any ruling on the pending motion.

[R. 467]

I further deny the allegation on the ground that the existence of "diversion" as a problem was acknowledged to a congressional committee by officials of four of the defendants herein:

(1) George R. Cain, Chairman of the Board of Directors, defendant Abbott Laboratories;

(2) Henry F. DeBoest, Vice President, defendant Eli Lilly and Co.;

(3) Robert B. Clark, President, Warner-Chilcott Laboratories of defendant Warner-Lambert Pharmaceutical Company.

Exhibit A to this affidavit consists of copies of pages from volume two of the hearings on "SMALL BUSINESS PROBLEMS IN THE DRUG INDUSTRY, House Select Committee on Small Business, 1967-68.

Mr. Cain testified:

"There has been testimony before this committee that some hospitals are able to resell pharmaceuticals to some retailers at prices which other retailers cannot obtain. *We know of only a few instances in the last several years where this practice was alleged to involve our products.* Certainly our intention is that any products which we sell to hospitals are for their own use." (page 636) (emphasis supplied)

Mr. DeBoest testified:

"A common practice in the drug business is

to allow lower prices to city, county, State, and Federal agencies, as well as nonprofit and charitable institutions, on purchases of supplies for their own use. Congress has encouraged procurement of drugs for Government agencies at lower prices and has specifically recognized the status of private charitable and educational institutions in the Nonprofit Institutions Act of 1968. That act, as you know, exempts purchases of supplies by the designated institutions for their own use from the provisions of the Robinson-Patman Act. We have tried to enable our wholesale distributors to provide pharmaceuticals to such institutions on a competitive basis by lowering the wholesaler's cost on selected Lilly items.

[R. 468]

"It has always been our understanding that this exemption in the Nonprofit Institutions Act was intended to apply only to supplies purchased by institutions for their own use. Previous testimony heard by this subcommittee has suggested that — in some localities, at least — institutions may be departing from the purpose of the exemption and engaging in retail sale of such supplies in competition with community pharmacies. If the subcommittee finds that, in practice, the exemption is behing [sic] extended beyond its intended purpose, Eli Lilly and Co. would support appropriate amendatory legislation to correct competitive inequities." (p. 500)

"MR. MORTON. If a hospital, in turn, has an in-house retail outlet for pharmaceutical products, which anyone can go in and use, does that

hospital have a perfect legal right to conduct such a business, as far as you know?

"Mr. DeBoest. Sir, I am not competent to state. I will defer to counsel on this.

Mr. MORTON. Your product moves through that channel, and the word 'Lilly' is on it. If a hospital is running a drugstore inside the hospital, doesn't this concern you? Let me put the question this way: At what price are they buying the pharmaceuticals? There is no recourse to the Lilly Co. if the hospital itself is in violation of the 'for its own use' clause?

"Mr. DeBoest. This is the real nucleus of the problem, the interpretation of the words 'for their own use' or the phrase 'for own use.' You say we are not concerned. Yes, we are concerned. * * *" (pp. 504-505)

—

"Mr. Potvin. Do you know of any diversion of product from direct accounts, State and Federal hospitals, and do you have any mechanism for identifying the diverted products and for preventing continuation of it?

* * *

"Mr. DeBoest. *We have heard from time to time of quantities of merchandise which were sold to hospitals entering retail channels.*

(no paragraph)

[R. 469]

When we have heard and known of this, we have approached the administrator of the hospital, pointing out the exemption to the Robinson-Patman Act and the hazard that he is taking, or someone of his staff is taking, in such a practice.

"I would say by and large we have been successful in seeing that the material stays in the own-use category." (p. 509) (emphasis supplied)

Mr. DeBoest also testified concerning sale of drugs to so-called "outpatients" and persons off the street:

"* * * But in general I think we can say that the furnishing of drugs to outpatients or to patients off the street probably results in a competitive inequity to the retailer * * *." (p. 521)

Mr. Morton testified:

"Mr. Potvin. How about hospital diversion? Have you had this problem?

"Mr. Morton. Well, I have heard many others speak on this subject here. It is, obviously, in our opinion, not a big problem. I would concur to this extent. *We have some abuse of this called to our attention,* and I think possibly we could—we have been, let's put it this way, much more diligent in this area for the past several years, possibly, than some of our competitors.

(no paragraph)

We think this is an unfair practice to the small businessman, and if it is called to our attention, which it has been on several occasions, we have taken steps to go to these institutions, and talk

to them. Usually this is satisfactory. If not, I might mention for the committee's benefit that in the year 1967 we deleted a total of nine accounts for this practice.

Mr. Dingell. These are direct sales to hospitals?

Mr. Morton. Yes, sir.

Mr. Dingell. May I ask, are these tax-supported hospitals or private hospitals?

[R. 470]

Mr. Morton. Some are, Mr. Dingell, some are not." (p. 865) (emphasis added)

Mr. Morton also testified concerning his company's anti-diversion agreement with hospitals and restrictions on sales to outpatients and members of the public:

> "Mr. Morton. May I also suggest this, Mr. Dingell. We have a form that is signed by each of these institutions stating that the merchandise purchased from us will be used for in-patients or members of the staff, internal use—Not for use outside. And we have this from each account that we sell.
>
> • • •
>
> "Mr. Dingell. Would you impose particular controls, or would it cause you particular concern, if you were to find a hospital had a retail pharmaceutical outlet on its premises?
>
> "Mr. Morton. Yes, sir.

> "Mr. Dingell. Would you impose some kind of a restriction on sales to the hospital when you had been generally giving them the hospital preferential prices that you give to hospitals?
>
> "Mr. Morton. *To the extent that they sign this agreement to use the merchandise internally, not for outpatient dispensing—not for walk-in traffic.*" (p. 866) (emphasis supplied)

Mr. Clark testified:

> "Mr. Potvin. Mr. Chairman.
>
> "What is the Warner-Chilcott policy on diversion, first as to the hospital type of diversion which you have heard discussed already today?
>
> "Mr. Clark. I have heard it discussed, Mr. Potvin. *We have had very little experience with it,* to be very honest. As a matter of fact, I cannot think of an instance where it has been brought to our attention in a way that caused me or anybody under me to take specific action.

(no paragraph)

[R. 471]

> Certainly it would be our feeling, however, that *our arrangements with hospitals contemplate selling them at a discount for their own use, and if there were diversion into the retail trade from the hospital, it would be in our opinion not in accord with our understanding with them.*
>
> "Mr. Potvin. In other words, it would be your understanding that although they might have a hospital pharmacy, it should not be actively engaged in direct competition with the community pharmacy?

"Mr. Clark. That certainly is our intention and understanding." (p. 623) (emphasis supplied)

The above-quoted testimony establishes that certain of the defendants herein "police" the alleged "non-profit" hospitals to investigate any reports of diversion into retail sales. Those investigations would be in the form of reports to superiors and memoranda of discussions between the company representatives and hospital officials. It is therefore my belief that if plaintiff were allowed to make the discovery it has requested concerning "diversion" evidence in defendants' possession the defendants would produce documentary and other evidence of "diversion" by some of the 14 alleged "nonprofit" hospitals.

55. There is an issue of relevant and material fact concerning defendants' allegation at page 13 of their memorandum that so-called "take-home" drugs "are usually a necessary convenience to the patient." I categorically deny that allegation because a patient well enough to be discharged from the hospital is usually well enough to obtain his or her drugs from a community pharmacy, in person, through a friend or relative, and in many instances, by delivery from the community pharmacy. My wife, who receives numerous medications, often receives her prescription drugs by having the pharmacy make a home delivery. I submit that any convenience to the patient is far overshadowed by the desire of the hospitals to earn large profits to support the so-called "non-revenue producing" hospital departments, as indicated by the forced

"take-home drug" sales evidenced in the Pye and Carlston

[R. 472]

depositions. The "take-home" drug charges are listed on the regular hospital bill, and the drug charges are paid automatically by the patient, his family, insurance carrier, or the state and federal welfare agencies under various welfare and medical care programs, e.g., Medicare. The temptation, therefore, is to give the patient as many "take-home" drugs as possible and add the charges to the hospital bill.

56. There is an issue of relevant and material fact concerning defendants' allegation at page 13 of their memorandum that the hospitals will not refill "take-home" prescriptions.

Kaiser, with one hospital pharmacy and five clinic pharmacies scattered through the Portland-Vancouver area, refills prescriptions for "outpatients" and others without restriction, as set forth in Greenlick deposition exhibit no. 4-40:

"Redispensing as an activity is part of the distributive function and is commonly referred to as refilling. *Redispensing is initiated by outpatient request for a previously dispensed prescription drug.* The pharmacist responsibility in this case is circumscribed by law, professional ethics and physician written or oral order. For example, *the pharmacist is permitted to redispense the prescription as many times as the physician has indicated* as long as this does not conflict with legal

regulations or with the pharmacist's professional judgment of appropriate drug use. * * *" (emphasis supplied)

Greenlick deposition exhibit No. 4-48 lists new and refill prescription growth rates by pharmacy for 1968 and 1969:

80,122 refill prescriptions in 1968
96,937 refill prescriptions in 1969
percentage of refill increase = 21.0%.

A total of *177,059* refill prescriptions for "outpatients" is substantial as a matter of fact and as a matter of law.

57. There is an issue of relevant and material fact concerning defendants' allegation at page 14 of their memorandum concerning the clinics as non-income producing departments. They do produce revenue.

[R. 473]

It should be noted in this context that "nonprofit" hospitals are largely self-supporting and the recipients of numerous federal grants. In addition, a substantial portion of all indigent persons receive paid medical care under Medicare and other state and federal programs.

Thus, we find at Greenlick deposition exhibit no. 4-46:

"A portion of Portland's indigent population is currently being provided with a prepaid drug

benefit through a program made available by the Office of Economic Opportunity.

(no paragraph)

This particular group is provided with a complete prepaid drug benefit through the Kaiser medical care system, *including all prescribed drugs, whether prescription or over-the-counter, and medical supplies.*" (emphasis supplied)

58. There is an issue of relevant and material fact concerning defendants' allegation at pages 14 and 15 that the pattern of drug distribution defendants purported to describe establishes as a matter of law that the alleged "nonprofit" hospitals purchase drugs for their own use within the meaning of 15 U.S.C. § 13c. Again, defendants ignore the overwhelming evidence in the record that the Kaiser organization sells drugs outside the 15 U.S.C. § 13c exemption, was caught doing so by the Internal Revenue Service, and was compelled to pay federal income taxes on such sales unrelated to the hospital's use.

59. Your affiant objects to defendants' reliance on the alleged functions of a modern hospital, including a quotation from a paper, on the ground and for the reason that the functions of a hospital as implied by defendants have nothing to do with the issue before the Court as posed by defendants' motion. The hospitals are not defendants. The diagnostic and treatment facilities of a hospital and the theories under which they operate are irrelevant and merely clutter the record when defendants rely on such theories.

[R. 474]

60. There is an issue of relevant and material fact concerning defendants' allegations at page 16 of their memorandum that Kaiser's drug purchases are for Kaiser's own use and are therefore exempt from the Robinson-Patman Act under 15 U.S.C. § 13c. I categorically deny that allegation.

Kaiser sells substantial quantities of drugs purchased at low, preferential prices not available to plaintiff's assignors and other community pharmacies in competition with Kaiser to:

(1) Permanente Services of Oregon, Inc., an Oregon for profit business corporation;

(2) Physicians for their office use as partners and employees of the Permanente Clinic, a partnership for personal gain;

(3) Employees and their families;

(4) "Outpatients;" and

(5) "Walk-in" customers having no connection with Kaiser.

Query: If Kaiser's drug purchases are exclusively for its own use:

(1) Why did the Internal Revenue Service insist that Kaiser pay federal income taxes on a substantial portion of its drug profits?

(2) Why did Kaiser's legal counsel recommend that Kaiser pay federal income taxes on a substantial portion of its drug profits?

(3) Why has Kaiser, since 1968, paid state and federal income taxes on a substantial portion of its drug profits?

(4) And why does Permanente Services of Oregon, Inc., an Oregon for profit business corporation, pay state and federal income taxes on its drug and other profits?

Defendants, of course, prefer to ignore the fact that Kaiser does, without protest, pay state and federal income taxes on a substantial portion of its profits from drug sales.

Defendants' reply brief, if one is filed, it is submitted, should respond to the above four questions.

[R. 475]

61. There is an issue of relevant and material fact concerning defendants' allegation at page 21 of their memorandum that Kaiser's drug sales to "walk-in" members of the general public not connected to Kaiser are "minimal." I categorically deny that allegation.

Defendants acknowledge that Pirtle deposition exhibit no. 2 lists a total of 6,055 "walk-in" drug sales during the 30-month period ending September 30, 1972. The figures were obtained from cash register records and are unchallenged.

A total of 6,055 "walk-in" drug sales is not minimal. Instead, the total represents a substantial amount of drug sales to the general public clearly outside of the 15 U.S.C. § 13c exemption.

62. There is an issue of relevant and material fact concerning defendants' allegation at page 21 of their memorandum that Pirtle deposition exhibit no. 2 shows, *inter alia*, "outpatient prescriptions dispensed to * * * nonmembers during the stated periods." I categorically deny that allegation. By definition, "nonmembers" do not receive treatment from Kaiser, hence nonmember sales cannot be and are not "outpatient" drug sales. They are "walk-in" drug sales.

Greenlick deposition exhibit no. 4-84 is a table titled:

"Relationship of Health Plan Membership to Numbers Of Prescriptions Filled by Kaiser Pharmacies."

The exhibit said:

Year	Health Plan Membership*	Prescriptions Dispensed By Kaiser Pharmacies
1960	48,800	57,100
1961	55,500	64,800
1962	59,400	74,800
1963	65,400	106,000
1964	72,400	130,300
1965	81,100	160,900
1966	86,600	186,300
1967	103,100	208,900
1968	119,300	258,100
1969	132,900	315,100

Estimates for 1970, 1975, and 1980 are not reproduced. The (*) refers to "As of year end."

[R. 476]

Greenlick deposition exhibit no. 4-48 reveals substantial drug sales to nonmember "walk-in" members of the public for the period ended December 31, 1969:

Total prescriptions dispensed	1,562,300
Health Plan membership prescriptions	824,500
TOTAL PRESCRIPTIONS DISPENSED TO NONMEMBERS	737,800

Dismissing 737,800 "walk-in" prescriptions as "minimal" would be ridiculous.

For calendar 1969 alone a total of *182,200* out of 315,100 Kaiser prescriptions were dispensed to nonmember "walk-in" customers.

Moreover, Kaiser's estimates for 1970, 1975 and 1980 reflect the expectation that "walk-in" sales will continue to increase. By 1980, for example, out of 744,000 prescriptions, only 275,000 are estimated to be member prescriptions. The remaining estimated *469,000* prescriptions would go to nonmember "walk-in" customers!

Closer in time, Greenlick deposition exhibit no. 4-84 estimates that in 1975, two years from now, health plan prescriptions would be 202,800, or less than half the 523,600 prescriptions for that approaching year. Nonmember "walk-in" prescriptions for 1975, therefore, would total *320,800!*

Referring to deposition exhibit no. 4-84, Greenlick deposition exhibit no. 4-83 says of that and related tables:

"* * * The estimates are considered to be very conservative because of these reasons."

63. There is a relevant and material issue of fact concerning defendants' allegation at page 17 of their memorandum to the effect that Kaiser to varying degrees has removed the barrier of high drug costs. I deny that allegation and refer back to pages 7, 8, and 9 of this affidavit, supra, which refer to evidence in the record of high drug profits on Kaiser drug sales based on high charges for drugs.

[R. 477]

64. There is a relevant and material issue of fact concerning defendants' allegation at page 16 of their memorandum to the effect that Kaiser provides "high-quality medical care * * *." Evidence in the record indicates that the "care" as it pertains to drugs is less than efficient.

Greenlick deposition exhibit no. 4-63 states:

"The present methods employed to order and maintain prescription and non-prescription drug stocks within the outpatient drug system are diverse and flexible, but are costly. In addition, even with the diversity and flexibility allowed, out-of-stock situations occasionally occur.

"The methods employed in ordering are also inefficient from a number of standpoints. * * *

the time for the preparation and delivery of an order varies from one to five days or more. The quantities sent are not always equal to the quantities ordered, out-of-stock situations at outlying clinic pharmacies occur upon occasion, drugs are often sent without having been priced, and drugs are never dated as to when received. * * *"

Greenlick deposition exhibits numbers 4-68 and 4-69 state:

"There is further evidence to suggest that the procedures employed for processing patient prescription renewal requests may not always be conducive to insuring a safe flow of drugs. * * *" (4-68)

"Therefore, it may be concluded that the procedures employed to monitor prescription renewal requests when more than one Kaiser pharmacy is used are ineffective for safely controlling the flow of most prescription drugs. Further, the methods employed to obtain physician authorization for renewing prescription orders are time-consuming and inefficient." (4-69)

Greenlick deposition exhibit no. 4-70 states:

"In the previous chapter, the analyses indicated that the medical care system has not organized the drug system to economically utilize its resources or to employ available technology in existing drug distributive activities. * * *"

[R. 478]

Greenlick deposition exhibit no. 4-77 states:

"The medical care system has not organized the drug system to provide drug services personalized to the specific drug needs of a patient or family. The present organization of the drug system, with little or no contact between pharmacists and patients, has resulted in impersonality and a minimal opportunity to capitalize upon the special expertise of drug system personnel in interacting, understanding and contributing to more personalized patient care, particularly involving drug services.

"Neither has there been any systematic attempts by the medical care system to coordinate the provisions of drug services as a direct input into total medical care. The drug system has not been organized to provide any systematic interaction between providers of drug services and other medical care providers or to exchange patient or drug utilization information in coordinating drug services in a patient's total medical care.

"*Accessibility*

"The medical care system has not provided the drug system with the attributes of accessibility other than meeting the quantitative demands for prescriptions generated by ambulatory patients preferring to purchase prescriptions at Kaiser pharmacies. There is evidence to suggest that the prescription services may not always be accessible where and when needed by patients. * * *"

Greenlick deposition exhibit no. 4-78 states:

"The dispensing activity is performed for anyone presenting an acceptable prescription order to any of five clinic pharmacies. However, only patients having had their original prescription dispensed at the Central Clinic pharmacy are able to obtain prescription renewals from the pharmacy system in the evenings or on Sundays.

"Evidence accumulated further indicates that the hours of pharmacy operation may not be adequate to provide acceptable patient accessibility to prescription services. The results of the patient questionnaires indicated that approximately one-third of the membership purchases only a few or none of their prescriptions from Kaiser pharmacies. Further, the members stated that hours of operation was an important reason for seeking pharmacy services from non-Kaiser pharmacies * * *."

[R. 479]

Greenlick deposition exhibit no. 4-78 states:

"The medical care system has not organized an equitable financing mechanism for prescription services utilized. The largest portion of prescription services are financed by out of pocket payment at the time of service. The pricing method employed provides a prescription charge which is generally lower than the prevailing community prescription charges. However, such a financing mechanism does not recognize that those patients who require the largest amounts of prescription drugs to maintain their health are generally those least able to afford them.

"The out of pocket method of financing prescription services may serve as a distinct barrier to patient access and efficient utilization of prescription drugs. Once the medical care system has incurred the expense of diagnosing a medical condition and determining a treatment plan involving prescribed medication, it is inconsistent and inefficient to maintain a barrier to access for drugs which may delay or prevent a patient from receiving the essential treatment. * * *"

Greenlick deposition exhibit no. 4-80 states:

"* * * during periods when prescription demand exceeded the productive capacity of the pharmacy, a waiting line of prescription orders rapidly developed, resulting in extended patient waiting times, reduced accessibility and patient dissatisfactions.

(no paragraph)

The results obtained from a patient questionnaire indicated that one primary reason for using non-Kaiser pharmacies was fast service. In addition, the most frequent general patient complaint about Kaiser pharmacies was slow service (see Appendix E, page 13, Table 22).

"The standard of care established by the medical care system has been to insure safety in the flow of drugs. *The analysis of the inpatient drug system indicated that the level of safety achieved did not constitute a professionally acceptable standard.* * * *" (emphasis supplied)

The above excerpts from an expansive investigation of the Kaiser drug distribution system, partly

financed by the federal government, is more than adequate to raise an issue of relevant and material fact.

[R. 480]

Additional authoritative indicia that the quality or lack of quality of Kaiser medical and drug care is a disputed issue is Exhibit B to this affidavit. Exhibit B, made a part of the trial court file by this reference, is a copy of the cover and article by Judity Milgrom Carnoy titled "Kaiser: You Pay Your Money and You Take Your Chances," published in 9 *Ramparts* magazine 26, November 1970.

65. There is an issue of relevant and material fact concerning defendants' allegation at page 22 of their memorandum that "walk-in" drug sales occur "infrequently" and that even if greater than testified to be [sic] witnesses other than Kaiser representatives, the number would be legally insufficient. I categorically deny said allegations.

The total drug sales in the record of drug sales by the 14 alleged "nonprofit" hospitals to "outpatients, employees, physicians for their office use, physicians for their personal use, students, volunteers, families of employees, physicians, students and volunteers, and last but not least, "walk-in" customers, is more than sufficient as a matter of fact and as a matter of law to confirm that such sales are outside of the 15 U.S.C. § 13c exemption because they are sales in competition with plaintiff's assignors and other community pharmacies.

Parenthetically, defendants persist in making a distinction between Kaiser and the remaining hospitals, described as "fee-for-service" hospitals. Kaiser charges for its various services, including services to hospitalized inpatients who are *not* members of any Kaiser health plan, as indicated by the following passage from Greenlick deposition exhibit no. 4-43:

> "The activity of pricing drug orders is classified as part of the distributive function. Drug orders to be priced fall into four categories: * * * and *non-member inpatient drugs.* * * *
>
> "*If the inpatient receiving drugs is not a member of the Health Plan,* he is charged on a cost-plus basis for each drug order received. * * *" (emphasis supplied)

[R. 481]

66. There is an issue of relevant and material fact concerning defendants' allegations at page 23 of their memorandum that the 14 alleged "nonprofit" hospitals do not advertise or solicit "walk-in" business or otherwise compete with plaintiff's assignors for sales to the public, and their pharmacy operations are successfully structured to avoid it. I categorically deny each of said allegations along with the companion allegation that "Their sales to walk-in customers are *de minimus* [sic].

The hospitals compete for sales by offering prices that community pharmacies cannot meet, to students, volunteers, employes and physicians and their families. The solicitation is in the form, among others, of policy announcements and agreements distributed to employees.

It is ridiculous to claim that the pharmacy operations of the various hospitals "are successfully structured" to avoid competition for sales when various pharmacies are located in the main lobby of the hospital or are otherwise easily accessible and do, in fact, make "walk-in" and other sales to persons not hospitalized inpatients.

Kaiser Chief Pharmacist Roscoe Pirtle makes no bones about selling drugs to the public:

> "A As a pharmacist, my understanding of the pharmacist's obligation is to fill a bona fide legal prescription from whoever presents it to them; that a pharmacist is not in a position to refuse the filling of a legally accurate document, if he has the material.
>
> "Q Well, my question is, sir, do you have any written instructions or rules governing who may purchase a drug and who may not?
>
> "A Essentially we have no rules of who may not.
>
> "Q In other words, if I happen to have a prescription in my pocket for a prescription drug, can I walk out the lobby and stop at your prescription pharmacy and if it is a legal prescription have it filled as a member of the public?
>
> "A. That is right." (Pirtle dep. p. 17, lines 17-25; p. 18, lines 1-6)

[R. 482]

67. There is a relevant and material issue of fact concerning defendants' allegation at page 24 of their memorandum that a ruling in favor of plaintiff "would render the institutions less able to perform their responsibilities."

I categorically deny said allegation.

The record is absolutely bare of any shred of "evidence" that would even tend to, let alone support, defendants' theory.

A ruling for plaintiff cannot and would not injure the 14 alleged "nonprofit" hospitals or any of them. Each hospital would continue to receive the benefit of the 15 U.S.C. § 13c "for their own use" exemption applied to hospitalized inpatient drug orders. Therefore, the hospitals would not be injured as to "inpatient" drug purchases.

Moreover, a ruling for plaintiff would *not* compel any of the hospitals to cease any of their various drug distribution practices, e.g., Kaiser's unlimited sales to the public. They could continue on as before.

The only difference would be that on other than hospitalized "inpatient" drug purchases, the hospitals would pay the same general price as the community and pharmacy [sic], less uniform quantity discounts. They could even maintain their huge profit percentages by suitable price adjustments, so how would any hospital be injured?

(Subscription and jurat omitted in printing)

[R. 483]

EXHIBIT A

SMALL BUSINESS PROBLEMS IN THE DRUG INDUSTRY

HEARINGS

before the

SUBCOMMITTEE ON ACTIVITIES OF REGULATORY AGENCIES

of the

SELECT COMMITTEE ON SMALL BUSINESS HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

pursuant to

H. Res. 53

A Resolution Creating a Select Committee to Conduct Studies and Investigations of the Problems of Small Business

---

Volume 2

Washington, D. C., August 8, 9, September 27, October 12, 1967; January 24, 25, February 13, 14, 15, 27, March 20, April 23, 1968

Printed for the use of the
Select Committee on Small Business

U. S. Government Printing Office
Washington: 1968

78-783

[R. 484]

* * * and must be signed by the representative. He is supplied a copy to keep in his possession. The policy states that failure to comply in all respects is cause for termination of employment. Samples of prescription drugs may be given only to practitioners licensed by law to prescribe them. Almost all of these products are now identified as samples right on the tablet or capsule and also on the package, and if I may, the word "sample" is spelled out, either indented on the tablet or printed. Our representatives are required to determine whether a physician can actually use the samples before they are left with him. Samples are not to be used to make trade adjustments of any kind.

There has been testimony before this committee that some hospitals are able to resell pharmaceuticals to some retailers at prices which other retailers cannot obtain. We know of only a few instances in the last several years where this practice was alleged to involve our products. Certainly our intention is that any products which we sell to hospitals are for their own use.

Dispensing of pharmaceuticals by hospital pharmacies to persons who are not inpatients of the hospital is another matter. Treatment of outpatients in hospital clinics and similar facilities is growing. Also, some doctors, for a variety of reasons, are establishing offices in or close to hospitals. Hospital pharmacies may fill prescriptions for patients of those doctors. As you have heard from several other witnesses, this is

a gray area. I believe there are some legitimate uncertainties in our industry as to the consequences of these developments. It would appear, therefore, that it might be appropriate for Congress to study the feasibility of clarifying these uncertainties in a manner satisfactory to all members of the health team.

In conclusion, I would again like to express our commendations to this subcommittee for its work in this area. I would like to offer the cooperation of Abbott Laboratories in any manner that might be helpful. I will be pleased to attempt to answer any questions that the subcommittee may have.

Thank you.

MR. DINGELL. Mr. Cain, your statement this morning from the standpoint of the small businessman is perhaps the most impressive one that we have received. I believe you and Abbott, on the basis of the facts in your testimony, deserve, the commendation of this committee. I wish you to know that.

MR. CAIN. Thank you, Mr. Chairman.

MR. DINGELL. Mr. Potvin?

MR. POTVIN. Mr. Chairman, on page 6 of your statement, Mr. Cain, you speak of your quantity discounts and you point out that you do have quantity discount prices on some products which are listed and are available to all customers, that customers may also request quotations on even larger quantities. How far do these discounts go? Could you spell it out for us in some detail, that is to say a large chain orders

a very large quantity. What would be the maximum discount they could receive?

MR. CAIN. Well, Mr. Potvin, as far as our company is concerned, and I can only speak for Abbott, here is an oddity that our marketing people have informed me of. The interesting point here is that the chain, for example, does not buy as many deals or does not buy in quantities that some of the independents do, and the reason for it is that they re * * *

* * * * *

[R. 485]

Eli Lilly & Co.'s use of independent wholesale distributors provides valuable support to many small businesses handling medical products and to the general public. Retail pharmacies and hospitals have access, within reasonable distances, to wholesale houses carrying the Lilly line. This relieves them of the financial burden and responsibility of maintaining large and complete inventories of our products. It helps to insure to the patient that he will get fresh, potent Lilly products.

An explanation of Lilly pricing policies and practice is important to a full understanding of Eli Lilly & Co.'s product distribution.

As stated earlier, Lilly sells exclusively to its wholesale distributors—with the exceptions already noted. We have no direct accounts with retail pharmacies, hospitals, physicians, or city, county, and State governments.

Our merchandise is available to all our wholesale distributors on the same terms. We have no "free goods" or promotional allowances for anyone. We give quantity prices to our wholesales distributors— on the same basis for all—by reducing their costs when they have made quantity sales to their customers.

A common practice in the drug business is to allow lower prices to city, county, State, and Federal agencies, as well as nonprofit and charitable institutions, on purchases of supplies for their own use. Congress has encouraged procurement of drugs for Government agencies at lower prices and has specifically recognized the status of private charitable and educational institutions in the Nonprofit Institutions Act of 1938. That act, as you know, exempts purchases of supplies by the designated institutions for their own use from the provisions of the Robinson-Patman Act. We have tried to enable our wholesale distributors to provide pharmaceuticals to such institutions on a competitive basis by lowering the wholesaler's cost on selected Lilly items.

It has always been our understanding that this exemption in the Nonprofit Institutions Act was intended to apply only to supplies purchased by institutions for their own use. Previous testimony heard by this subcommittee has suggested that—in some localities, at least—institutions may be departing from the purpose of the exemption and engaging in retail sale of such supplies in competition with community pharmacies. If the subcommittee finds that, in practice,

the exemption is being extended beyond its intended purpose, Eli Lilly & Co. would support appropriate amendatory legislation to correct competitive inequities.

I have tried to be responsive to areas in which the subcommittee has expressed an interest, and I shall be glad to answer questions which you may have.

(The attachments to the prepared statement follow:)

HENRY F. DEBOEST

Henry F. DeBoest is vice-president for corporate affairs of Eli Lilly and Company. He is a member of the company's Board of Directors and of the executive committee of the Board and is a director of a Lilly subsidiary, Eli Lilly International Corporation.

DeBoest joined the firm as a salesman in Eugene, Oregon, on July 25, 1932. In 1934 he was transferred to Portland, becoming manager of the Portland district in 1939. He returned to that post in 1945 after three years as a chemical warfare officer with the United States Army in World War II.

Transferred to the home office in Indianapolis on August 1, 1947, DeBoest spent four years as assistant director of the production control division. He was

* * * * *

[R. 489]

MR. POTVIN. Now, in looking at the itemized statement of All Saints Episcopal Hospital in Fort Worth, Tex., we find a long list of pharmacy charges running from November 22d to the 25th totaling $32.35. We then find three charges, one for $3, one for $1.80, and one for $6.40. It says "Take-home Drugs."

Now, it is in this area of take-home drugs and outpatient and that sort of thing that it seems to me the

community pharmacist has one of his most serious problems. Can you tell me your thoughts on this, sir?

Do you feel that a take-home drug is a sale that is made in competition with the community pharmacist?

MR. DEBOEST. Sir, that would have to be qualified with what the "take-home" drug is and the circumstances under which it was prescribed.

MR. POTVIN. Are there drugs that hospitals are allowed to give patients that community pharmacists are not allowed to sell?

MR. DEBOEST. Well, no, sir, with great exceptions. There are a few but they would not be "take-home" drugs, as I understand it. The only thing that I could visualize in the case that you are just talking about was that there might have been a paste made up to fit into the tooth socket which the physician wanted or the oral surgeon wanted especially prepared in that hospital. I would have no way of knowing. But in general I think we can say that the furnishing of drugs to outpatients or to patients off the street probably results in a competitive inequity to the retailer, and this is why we recommend an examination and ultimately a definition of what "for own use" means.

MR. BROYHILL. The bells have been rung for a quorum call of the House. We will recess at this time and reconvene at 2 p.m.

I would like to ask a few questions at that time. We can also hear from the other witness scheduled.

(Whereupon, at 12:20 p.m. the subcommittee recessed to reconvene at 2 p.m. the same day.)

AFTERNOON SESSION

MR. BROYHILL. The subcommittee will come to order.

When we recessed, we were questioning Henry F. DeBoest, vice president of Eli Lilly & Co. I believe counsel has a few more questions he would like to ask you, Mr. DeBoest. We appreciate your coming back this afternoon.

MR. POTVIN. Mr. Chairman.

Mr. DeBoest. I was pleased to note in the January 2 issue of FDC Reports that Lilly apparently is in fairly robust financial condition at this time, looking at the figures on your gross and your net and so forth. Now, in general terms have your dollar sales increased or decreased over the past 5 years?

MR. DEBOEST. Increased.

MR. POTVIN. And would that most likely be true in the New York City area?

MR. DEBOEST. Yes, I believe so.

MR. POTVIN. And how many wholesalers have you added in New York in the past 5 years?

MR. DEBOEST. I would have to check the list, Mr. Potvin. I do not know.

* * * * *

[R. 490]

MR. POTVIN. You do not, I gather, give any discount on quantity at all to your wholesalers?

MR. MORTON. That is correct, sir.

MR. POTVIN. There would be no exception based on the kind of business or source of order, or size of order; would there, sir?

MR. MORTON. Not to wholesalers, no sir.

MR. POTVIN. There would be no situation whereunder a retailer could buy direct from you?

MR. MORTON. No, sir.

MR. POTVIN. I know you have gotten into some diversion situations of the nonhospital variety. I suspect that because of pending litigation you would prefer not to discuss them at this time?

MR. MORTON. I think it would not be proper here, sir.

MR. POTVIN. How about hospital diversion? Have you had this problem?

MR. MORTON. Well, I have heard many others speak on this subject here. It is obviously, in our opinion, not a big problem. I would concur to this extent. We have some abuse of this called to our attention, and think possibly we could—we have been, let's put it this way, much more diligent in this area for the past several years, possibly, than some of our competitors. We think this is an unfair practice to the small businessman, and if this is called to our atten-

tion, which it has been on several occasions, we have taken steps to go to these institutions, and talk to them. Usually this is satisfactory. If not, I might mention for the committee's benefit that in the year 1967 we deleted a total of nine accounts for this practice.

MR. DINGELL. These are direct sales to hospitals?

MR. MORTON. Yes, sir.

MR. DINGELL. May I ask, are these tax-supported hospitals or private hospitals?

MR. MORTON. Some are, Mr. Dingell, some are not.

MR. DINGELL. With respect to the diversions which have taken place in each of those instances—were they through the hospital pharmacy, or were they directly through the property control in the hospital itself? Perhaps we can direct our questions to this.

MR. MORTON. I could not answer that completely, a hundred percent accurately, because I did not participate personally in this. But I imagine it would be through the hospital pharmacy, sir.

MR. DINGELL. Would it be an inconvenience for you to submit to the committee information as to just in a general fashion how these diversions occur in each case—whether it was through the hospital pharmacy, or whether it was right through the property controller stockroom or whatever you call it right in the hospital?

MR. MORTON. If we have this information, we will be more than happy to submit it. I do not know that

I can verify for sure where this came from.

MR. DINGELL. I am just asking for the best information that you would have available to you, sir.

MR. MORTON. Yes, sir, I would be glad to.

(This information appears at the end of this testimony.)

MR. FORREST. Might I interrupt to be sure we are in the same frame of reference, Mr. Chairman? Now, we draw a distinction between hos-

* * * * *

(Certificate of service omitted)

[R. 515]

United States District Court for the District of Oregon

RULE 56 AFFIDAVIT OF LOGAN WALLACE, PRESIDENT OF PLAINTIFF, IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION

(Filed March 22, 1973; caption omitted in printing)

State of Oregon)
County of Multnomah) ss.

I, LOGAN WALLACE, being first duly sworn, depose and say:

1. I am a registered pharmacist licensed by the State of Oregon to practice pharmacy, a pharmacist at Logan Wallace Prescriptions, a community pharmacy located at 1735 North Wheeler Avenue, Port-

land, Oregon, an assignor in the above-titled cause, President of plaintiff, Portland Retail Druggists Association, Inc., am familiar with the trial court file and the proceedings, and am competent to make this affidavit concerning the matters stated herein.

2. I make this affidavit in opposition to defendants' motion for partial summary judgment on plaintiff's Second Cause of Action, pursuant to the provisions of F.R.Civ.P. Rule 56(e).

3. I deny defendants' contentions that defendants' sales to the 14 alleged "nonprofit" hospitals are exempt from the Robinson-Patman Act under 15 U.S.C. § 13c and that defendants are entitled to judgment as

[R. 516]

a matter of law.

4. I submit that defendants' sales to the 14 alleged "nonprofit" hospitals are in violation of the Robinson-Patman Act and outside of the 15 U.S.C. § 13c exemption to the extent that said hospitals resell defendants' drugs to other than hospitalized "inpatients."

5. There is ample evidence in the record that the alleged "nonprofit" hospitals resell drugs purchased from defendants to persons and institutions such as the private Permanente Clinic other than hospitalized "inpatients," to-wit: employees, physicians, students, volunteers and their families, physicians for their office use as physicians in practice for personal gain, plus thousands of members of the general public

known as casual "walk-in" customers. These "walk-in" customers have no connection with the hospital other than as retail drug purchasers.

6. Defendants admit such sales, but in their memorandum (1) attempt to minimize the number of non-15 U.S.C. § 13c sales and when they cannot be minimized (2) attempt to explain away their significance.

7. Defendants, therefore, have made an *issue* of the *number* of "walk-in" and other retail sales in violation of the 15 U.S.C. § 13c exemption. Moreover, the Court has indicated that it considers "numbers" to be significant in determining whether the defendants have violated the Robinson-Patman Act.

8. Because "numbers" is an issue the plaintiff must obtain discovery from a prime source of evidence concerning the magnitude of the "numbers" and related practices—the defendants themselves.

9. As a practicing pharmacist I know that defendants' representatives generally known as "detailmen," regularly and systematically visit the alleged "nonprofit" hospitals and during such visits observe and then make reports concerning their observations to their companies. The various defendants have those reports and they should be produced prior to the time the Court rules on the pending motion. Greenlick Kaiser deposition exhibit no. 4-27 describes such visits:

* * * * *

(Subscription and jurat omitted in printing)

[R. 536]

United States District Court for the District of Oregon

RULE 56 AFFIDAVIT OF HOWARD STEINBACH IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION

(Filed March 28, 1973; caption omitted in printing)

STATE OF OREGON)
County of Multnomah)ss.

I, HOWARD STEINBACH, being first duly sworn, depose and say:

1. I am a registered pharmacist licensed by the State of Oregon, a partner in the operation of three pharmacies in the metropolitan area of Portland, including the Bel Aire Pharmacy, 12020 S. W. Allen Avenue, Beaverton, Oregon 97005, an assignor in the above-titled cause, have attended various of the drug practices depositions taken by plaintiff, have read and studied defendants' memorandum in support of their motion for summary judgment on the plaintiff's Second Cause of Action, and am competent to make this affidavit concerning the matters stated herein.

2. Pursuant to F.R.Civ.P. Rule 56(e), make this affidavit in opposition to defendants' motion for partial summary judgment on the plaintiff's Second Cause of Action.

3. Based on my knowledge of the practice of pharmacy and the bulky but incomplete record of evidence in this case, I state that the

[R. 537]

14 alleged "nonprofit" hospitals and related clinic pharmacies are in direct competition with plaintiff's assignors and other community pharmacies for the retail trade and custom of individual purchasers of drugs in Multnomah, Clackamas and Washington counties, Oregon.

4. The pharmacies of the 14 alleged "nonprofit" hospitals and related clinic pharmacies serve the same trading area and customer population as plaintiff's assignors and other community pharmacies in Multnomah, Clackamas and Washington counties, Oregon.

5. The plaintiff's assignors and other community pharmacies in Multnomah, Clackamas and Washington counties, Oregon, have lost, and continue to lose, a substantial dollar volume of retail drug sales to the alleged "nonprofit" hospitals and related pharmacies with which plaintiff's assignors and other community pharmacies are in direct competition.

6. I categorically and without qualification deny defendants' attempt in their memorandum to dismiss as "de minimus" [sic] the number of prescriptions sold by the 14 alleged "nonprofit" hospitals and related clinic pharmacies and the dollar volume of sales represented by those prescriptions. They are substantial both to the hospitals and to the community pharmacies. To attempt to dismiss them as "de minimus" [sic] is contrary to the record and to the meaning of the word. Those sales and prescriptions are not a trifle.

7. Approximately one mile from the Bel Aire Pharmacy is the Beaverton Clinic unit of the Permanente Clinic. The address of the Beaverton Clinic is 4855 S. W. Western Avenue, Beaverton, Oregon 97005. It is a unit of the Permanente Clinic, a partnership of physicians for personal gain. Opened in 1969, the Beaverton Clinic is directly across the street from a major shopping center, Valu-Mart, next to a large home building material supplier, Handyman Home Center, a few blocks from another major discount shopping center, Baza'r, just off a heavily traveled major arterial highway, the Beaverton-Hillsdale Highway linking Portland and Beaverton.

[R. 538]

8. The pharmacy in the Beaverton Clinic of Permanente Clinic is located just to the right as one enters the clinic lobby, approximately twelve (12) feet from the front door. It is situated so that foot traffic leaving the elevator tends to head directly to the pharmacy. In other words, the pharmacy occupies a prominent position in the clinic lobby and is easily accessible to the general public.

9. Plaintiff's deposition of Mr. Roscoe Pirtle, Kaiser's Chief Pharmacist and the supervisor of the Beaverton and other Permanente clinics, confirmed that the Bess Kaiser Hospital pharmacy and the Beaverton and other clinic pharmacies sell prescription and over-the-counter drugs without restriction to the general public. The pharmacy in the Beaverton Clinic of Permanente Clinic is situated to encourage members of the general public to purchase drugs from the pharmacy.

10. During the past ten years the population of the Beaverton area had doubled and the number of retail drug outlets had almost doubled. When Permanente Clinic opened its Beaverton Clinic in 1969 the number of community pharmacies was adequate to serve the Beaverton area. In October of 1972, the Kaiser-Permanente health plan was extended to Tektronix, the major employer in the Beaverton area with some 6,000 Beaverton area employees.

11. Based on Beaverton Clinic prescription containers received by various community pharmacies, prior to the addition of Tektronix the Beaverton Clinic filled on the order of 100 new prescriptions daily. Based on the same criteria and evidence, six months later the Beaverton Clinic of Permanente Clinic was filling on the order of 200 new prescriptions daily.

12. Kaiser Foundation Hospitals is financing a $900,000 expansion of the Beaverton Clinic of Permanente Clinic to increase the clinic staff to 27 physicians from the present 12. On this basis the prescriptions filled by the Beaverton Clinic would increase from the present 200 per day to 450 new prescriptions per day, plus refills. This anticipated increase in prescription volume would represent a

[R. 539]

noticeable diversion of drug income and business to the Beaverton Clinic of Permanente Clinic from the community pharmacies in the Beaverton area. This diversion and loss of business could result in the closure of one or more community pharmacies in the Beaverton area that could not continue to compete with the Beaverton Clinic of Permanente because of the lower prices received by Kaiser.

13. *The Valley Times*, a weekly newspaper published in Beaverton, Oregon, said in its March 22, 1973 issue under the headline: "Addition Planned to The Permanente Clinic":

> "Contract in the amount of $900,000 was awarded last week by Kaiser Foundation Health Plan of Oregon to the successful bidder, Juhr and Sons, Portland contractors, for addition to The Permanente Clinic, Beaverton. Construction is to begin immediately.
>
> "The clinic, completed in August, 1969, is at 4855 SW Western Avenue near the Beaverton-Hillsdale Highway intersection. This first major addition will more than double capacity from 12 physicians to 27 physicians and add one optometrist, new optical shop and enlarged stat laboratory.
>
> "Extension of the parking lot to undeveloped land south of the building will accommodate 175 additional vehicles.
>
> "Enlarged facilities have become necessary due to rapid growth of Health Plan membership

> in the Beaverton area, according to Sam G. Hufford, executive vice president and regional manager."

13. Mr. Roscoe Pirtle identified Pirtle Kaiser deposition exhibits numbers 5-B and 5-C, representations of Permanente Clinic pharmacy prescription labels. Both the Pauline Lee prescription identified in Pirtle deposition exhibit no. 5-B and the Sharon Wallace prescription identified in exhibit no. 5-C had labels attached to the birth control containers stating "CLINIC SALE ONLY."

14. Mr. Pirtle testified:

[R. 540]

> "Q Now, with respect to the drug to Sharon Wallace, a sheet of paper attached to the container states, 'Clinic sale only.' Does that have any significance to you, the words, quote 'Clinic sale only?'
>
> "A Yes.
>
> "Q What does it mean, as you understand those words?
>
> "A My understanding is that it is for sale within our clinic settings.
>
> "Q And nowhere else?
>
> "A Correct.
>
> "Q I take it your answer would be the same for this prescription to Pauline Lee?
>
> "A Correct." (Pirtle dep. pp. 48-49)

Mr. Pirtle therefore admits that the pharmacies he supervises sells [sic] drugs marked "CLINIC SALE

ONLY." The two prescriptions, by definition, were not issued to hospitalized inpatients of the Bess Kaiser Hospital. They were issued to persons who, on the record, are members of the general public.

15. The Pauline Lee prescription was for Ortho Novum 1 mg (Pirtle deposition exhibit no. 5-B) and the Sharon Wallace prescription was for Ortho Novum 2 mg (Pirtle deposition exhibit no. 5-C). The instruction label attached to the Sharon Wallace prescription also identified the manufacturer as a defendant herein:

> "Ortho Pharmaceutical Corporation
> Raritan, New Jersey 08869."

16. Mr. Myron Robinson is the local representative for Ortho Pharmaceutical Corporation. Earlier this year Mr. Robinson informed me that his company stamps "CLINIC SALES ONLY" on certain packages in the Ortho line to show that the merchandise was sold to tax-supported institutions, county, state and federal, at a preferentially low price. The packages are so marked to avoid diversion to unauthorized outlets, he told me, and are sold *only* to tax-supported institutions and agencies.

[R. 541]

17. The Permanente Clinic and its clinic pharmacies are not qualified to receive "FOR CLINIC SALE" only drugs from defendant Ortho Pharmaceutical Corporation if, as Mr. Robinson informed me,

drugs so marked are distributed exclusively to tax-supported public agencies. Permanente Clinic is not a tax-supported public institution or agency. Instead, Permanente Clinic is a private partnership of physicians for personal gain.

18. Exhibit A to this affidavit is a list of pharmacies closed in the Portland area of Oregon. Titled "Portland Pharmacy Closures," the exhibit was prepared by the Oregon State Board of Pharmacy from its records. Exhibit A discloses by calendar year the number of community pharmacies in the Portland area that have gone out of business:

1972	7
1971	7
1970	11
1969	6
1967	8
1966	8
1965	7
1964	2
1963	8
1962	1
1961	4
1960	1
1959	0
1958	0
1957	2
1956	0
1955	1
1954	2

The records reflect a correlation between the growth of Kaiser group prescriptions in the early 1960's and the decline of retail pharmacies.

[R. 542]

19. Exhibit B to this affidavit is a map titled "Metro-Portland Pharmacies." Exhibit B-1 is a transparent overlay over Exhibit B. Exhibit B shows the community pharmacies that have closed in the Portland Metropolitan Area since 1950. Closures total 124, with 70 of the closures, or 57 percent, coming since 1960. Exhibit B-1 is an overlay reflecting a three-mile sphere of influence from various Kaiser and Permanente Clinic pharmacies. Exhibit B-1 discloses that only 11 of the 124 community pharmacies closed are outside of the Kaiser sphere of influence.

20. Kaiser Health Plan membership in the Portland area has grown at a steady rate from 1960 through 1969, as set forth in Greenlick Kaiser deposition exhibit no. 4-89:

1960	48,800	
1961	55,500	
1962	59,400	
1963	65,400	
1964	72,400	
1965	81,100	
1966	86,600	
1967	103,100	
1968	119,300	
1969	132,900	
1970	141,200	(estimated)

1971	152,600	"
1972	164,500	"
1973	176,800	"
1974	189,600	"
1975	202,800	"

Kaiser's estimates for growth since 1969 were conservative, as indicated by the year end figures listed in Scott Kaiser deposition exhibit no. 24: 145,568 for 1970, 158,010 for 1971, and 175,385 as of November 30, 1972.

[R. 543]

21. The number of community pharmacies in the Portland area in relation to the growth of the Kaiser pharmacy operation beginning in 1963 is fairly constant. Kaiser alone did not eliminate these community pharmacies. However, the effect of Kaiser's competition and the competition of other alleged "nonprofit" hospitals using lower drug acquisition costs and nonprofit status, was to remove the profitability from the unfortunate community pharmacies forced to close. Profitability is the vital factor. With profitability removed, the community pharmacy could not be sold, remaining open was not feasible, and closure resulted.

22. The competition of the Beaverton Clinic and other alleged "nonprofit" hospitals is reflected in the following random calculations based on actual prescription containers:

(a) The Beaverton Clinic of Permanente issued prescription no. BT 131,719 on January 25, 1973

and prescription no. BT 133,257 on February 3, 1973, or a total of *1,538 prescriptions during a 10-day period;*

(b) St. Vincent Hospital issued prescription no. 150,328 on December 17, 1971, and prescription no. 167,039 on January 23, 1973, or a total of *16,711 prescriptions during a 13-month period;*

(in contrast, the Bel Aire Pharmacy that competes with St. Vincent and other alleged "nonprofit" pharmacy operations, serially numbered 9,826 new prescriptions during the period that St. Vincent numbered 16,711 new prescriptions;)

(c) Emanuel Hospital issued prescription no. 530,053 on December 12, 1972, and prescription no. 531,458 on December 25, 1972, or a total of *1,405 prescriptions during a 14-day period;*

(d) Good Samaritan Hospital issued prescription no. 170,569 on August 2, 1972, and prescription no. 174,436 on December 9, 1972, or a total of *3,867 prescriptions during a four-month period.*

The above figures reflect the competition for retail trade of the alleged "nonprofit" hospitals and help explain pharmacy closures.

[R. 544]

23. There is an issue of relevant and material fact concerning defendants' allegation at page 23 of their memorandum that "The record shows no significant distribution of drugs to doctors' offices." That

statement is contrary to the record, which shows diversion to physicians' offices, including substantial diversion of drugs purchased by Kaiser at preferential prices to the offices of Permanente Clinic physicians, a partnership of physicians for private gain. Defendants at some expense took the depositions of three Kaiser witnesses, one from New York and the two others from Oakland, California, but made no attempt to deny that the Permanente Clinic physicians received drugs from Kaiser. A limited amount of data is found in Greenlick deposition exhibit no. 4-51. The exhibit indicates that drugs with a total cost of $25,607 were transferred in 1968 to the various Portland area Permanente clinics. The comparable drug transfer cost in 1969 totaled $65,923, or more than twice the 1968 figure. And, of course, the Court denied plaintiff's motion to obtain discovery concerning Kaiser's shipments of drugs received in Portland to points outside the state of Oregon. The objections to the proposed discovery indicates that someone had something to hide. Not until plaintiff is allowed to make proper and complete discovery, will the record show whether or not sales to physicians for their office use and other diversion has, in fact, occurred. Much of that evidence is in the sole possession of defendants, invoices and shipping orders reflecting "drop shipments" direct to physicians and others using preferential hospital prices, that are not reflected in hospital records and may not even be known to the witnesses deposed by plaintiff. See the Ralph Sessler deposition:

"Q Can you give me some idea of the quantity of any of those physician office use drug orders?

"A * * * How that was billed or whether it had anything to do with the hospital billing, I couldn't say.

[R. 545]

"Most of the orders which I received were not significant, *they would receive direct, but on occasion I had belief to think that some of these things were drop shipped to the physician.*

"Q What do you mean by drop shipped?

"A Well, in other words, *the salesman would approach a doctor for an order and he might submit it through the hospital.* My orders had to go through. I had to use a purchase order and in other words, if there was billing to them and I didn't initiate a purchase order, then it would have to have been taken care of through the office and not within my knowledge, but, of course, this again is surmised." (Sessler deposition p. 11, lines 11-25, p. 12, lines 1-6) (emphasis supplied)

Mr. Sessler also testified:

"Q There was no effort on the part of anyone so far as you know to conceal anything about prescriptions?

"A No, no, there was no effort. In fact, you see in the original Osteopathic Hospital was a small hospital in the city and they had a hard time getting started. There were a few doctors and *the doctors were encouraged to make as many purchases as they could through the pharmacy to offset costs.*

"It had become an outmoded custom and as I say, Mr. Chambers, the Administrator who was there, and he is dead now, he wished to discourage it, he did not want to carry doctor bills through the hospital on his books and had narrowed it down to a point where if they were not prompt in payment he would tell me to get them to pay up and discourage this, you know." (Sessler deposition p. 18, lines 15-25, p. 19, lines 1-8) (emphasis supplied)

Mr. Ronald Allen Bremner, Portland Osteopathic Hospital Chief Pharmacist confirmed the testimony of Mr. Sessler:

"Q Now, you mentioned drugs to doctors' offices.

What did you mean by that, sir?

"A Well, this is office supplies, like antibiotics, a shot of pencillin or something—if a patient comes in and has gonorrhea or syphilis, something like that, they will

[R. 546]

give them a shot of pencillin right in the office, and these are more or less office supplies they pick up.

* * *

"Q Do you ship the drugs that go to doctors for their office use by mail or how is it physically transferred?

"A They pick them up at the pharmacy.

"Q Is the package wrapped up?

"A No.

"Q How is it done?

"A They come in and order the items they want and you just give it to them." (Bremner deposition p. 7, lines 18-24; p. 9, lines 8-15)

Mr. Milo Haas, Director of Pharmacy Services for Dwyer Memorial Hospital, testified:

"Q What were the specialty items that were referred to earlier?

"A Types of refilled syringes, injectable, that would be needed — sometimes like 2.8 units of penicillin that would be needed immediately.

"Q Well, is this for the personal consumption by the physician?

"A That type, no, it would not be.

"Q What is that category used for?

"A Probably be used for doctor's office practice.

"Q And that is what specialty items are?

"A That is a specialty. Like another specialty would be something like a catheter, which are a prescription item, and basically are supplied by the pharmacy.

"Q These items, I take it, are available from the wholesaler or the manufacturer by anyone who is eligible to purchase them?

"A Yes, any pharmacy could."

(Haas deposition p. 4, lines 20-25; p. 5, lines 1-10)

[R. 547]

Mr. Charles Ferrell, Willamette Falls Hospital Chief Pharmacist, testified:

"Q (By Mr. Kane) What is your pricing policy on sales to physicians?

"A Generally at our invoice price. We don't pass on our discount to the physician.

"Q Just invoice price and nothing else?

"A Right. For example, we don't sell — let me put it this way, we sell very little to physicians. On occasions we, on case prices we get a 10 percent discount and *we charge the physician the invoice price* and do not pass on the discount, but our dollar volume to physicians is very small.

* * *

"Q What restrictions, if any, do you have?

"A *There have been no restrictions.* It has not been a problem.

"Q Does that mean you will fill an order for a physician for drugs for his office use?

"A No. It has happened probably five times in two years.

"Q What has happened?

"A That *we have taken orders or sold merchandise to a doctor for his office use.*

"Q What type of drug merchandise?

"A Local anesthetic.

"Q Anything else?

"A Injectables.

"Q Anything else?

"A No.

"Q Are these injectables materials that are available from a wholesaler?

"A Yes." (Ferrell deposition p. 9, lines 6-16; page 10, lines 2-19) (emphasis supplied)

Mr. Joseph Clarence Chartier, Gresham Community Hospital Chief Pharmacist, testified:

[R. 548]

"Q Does the hospital sell drugs to physicians for their office use?

"A In a very, very, very limited quantity.

"Q What do you mean by very limited?

"A * * * We do have some physicians not associates, excuse me, but they do have their offices in our hospital and one of them purchases some items from me, 90% of which are for his wife's personal use.

"Q *Does that mean that say 10 percent is for his office use in the hospital?*

"A That is right."

(Chartier deposition p. 10, lines 22-25; p. 11, lines 3-9)

Mr. James Zeasas, Holladay Park Hospital Chief Pharmacist, testified:

"Q Now, do you sell prescription drugs to physicians other than for their own personal consumption?

"A Other than for their own personal use?

"Q Yes, say their office supplies?

"A On occasion.

"Q What are the circumstances?

"A Well, there are many drugs that drug stores don't carry, many injections that drug stores don't carry. Some of the antimetabulites for cancer are only available through a hospital pharmacy?

"Q Why is that, sir?

"A Well, I don't think that a drug store would stock it. I don't see why they would.

"Q There is no legal restriction?

"A No, there is no legal restrictions." [sic]

(Zeasas deposition p. 18, lines 6-20)

Mr. Henry Wong, Providence Hospital Chief Pharmacist, testified:

"Q Now, with respect to sales of prescription drugs to your staff physicians, do you place any restrictions on the amount of drugs that the physician may purchase?

"A No. You mean how much can they buy?

[R. 549]

"Q Yes.

"A No." (Wong deposition p. 22, lines 22-25; p. 23, lines 1-2)

Mr. Conrad M. McConnell, St. Vincent Hospital Director of Pharmacy, testified:

"Q Now, do you sell drugs to physicians on the staff of the hospital?

"A Occasionally we have.

"Q Do you have any instructions concerning limitations on sale of drugs to physicians?

"A No, not instructions.

"Q No instructions at all?

"A No."

(McConnell deposition p. 19, lines 3-10)

24. There is an issue of relevant and material fact as to whether the alleged "nonprofit" hospitals that sell drugs at preferentially low prices to physicians, employees, students, volunteers and the families of same are in violation of the rules of the Public Welfare Division of the State of Oregon. Rule no. 4 of the

division's drug guidelines, applicable to the "non-profit" hospitals, states:

"The price to be paid by the Public Welfare Division for any drug in the lists of Basic Drugs set forth in this guide will be billed by the pharmacist at the *lesser of:*

1. The ceiling price quoted in the Basic Drug lists; *or*

2. The usual and customary charge by the pharmacist to the general public.

"NOTE: 'General public' means more than the pharmacist's total customer load. The term includes an identifiable group such as an association, society or organization of persons having a common interest; number of persons forming a recognizable unit; number of persons classified or gathered together because of common interest, characteristics, or community of interest; persons covered under an insurance plan; 'Prescription Club' members; etc.

(no paragraph)

[R. 550]

If drugs are dispensed to persons in these groups at prices less than the ceiling prices payable by the Public Welfare Division, as a tax-supported agency, they should be billed for at the lesser amounts."

See Fawkes deposition exhibit no. 12, titled "STANLEY HARTMAN AFFIDAVIT RE EMANUEL HOSPITAL DRUG DISTRIBUTION PRAC-

TICES." Paragraph VIII of Fawkes deposition exhibit no. 12 referred to an overcharge to the Public Welfare Division by Emanuel Hospital. Mr. Fawkes testified:

"Q (By Mr. VavRosky) Mr. Fawkes, with respect to Paragraph V and Paragraph VI, Mr. Hartman has alluded to the Pharmaceutical Services Guide for Public Welfare Medical Assistance Programs.

"I think that has been made an exhibit in this deposition.

"With respect to Paragraph VIII Mr. Hartman explained a situation involving a charge for a drug to the Welfare Division.

"Have you had occasion to check on the accuracy of that statement?

"A Yes, I looked this prescription up and it was for a woman who is a Welfare patient and also a member of our resident outpatient clinic and the price he has on there is correct, that is what this patient was charged or the charge that was put on the prescription for this patient.

* * *

"Q (By Mr. VavRosky) As to Prescription No. 468-522B, line 20, Mr. Fawkes, have you had occasion to check on the charges as related by that prescription?

"A Yes, *this was incorrectly charged.* It should have been $3.85 on there and how it was charged wrong I can't tell you, unless they took it from the line above or the line below on the schedule, but it was a mistake. It went through and they didn't catch it down there." (Fawkes Dec. 21, 1972 deposition, p. 32, lines 14-25; p. 33, lines 1-4; 11-18) (emphasis added)

The record is full of testimony and exhibits confirming that the alleged "nonprofit" hospitals sell drugs to employees and physicians for substantially less than the general price. Employees and physicians are within the definition of the term "General Public."

[R. 551]

Exhibit C is State Public Welfare Division form PWD 502, revised 8/72, titled "PRESCRIPTION DRUG INVOICE." Hospitals and others that bill the state for prescriptions are required to use the form, which contains a certification that the drugs or services were rendered according to Oregon law and the rules and regulations of the Public Welfare Division.

At the bottom of the form is the following order in large, red block letters:

> "YOU MUST BILL AT YOUR CHARGE TO THE 'GENERAL PUBLIC' IF LESS THAN THE AMOUNT ALLOWED BY WELFARE."

Emanuel Hospital's employees and physicians constitute a "General Public" within the meaning of the agency's regulations. Employees and physicians of the hospital receive their prescription drugs for less than the maximum welfare rate. However, plaintiff's deposition discovery established that Emanuel Hospital bills the state at the welfare level or above, instead of the much lower rate granted employees and physicians.

25. The record establishes that the alleged "non-

profit" hospitals, especially Kaiser, are capturing more of the retail drug business in the Portland area year after year. The figures in the record are obsolete because the new figures accumulated and reflecting growth since the end of plaintiff's limited depositions are not in the record. What is in the record, however, is a realistic projection of drug sales in competition with community pharmacies by 1980 — seven years from now. The projection is found in Greenlick Kaiser deposition exhibit no. 3-215:

> "The Long Range Planning Committee has projected that by 1980, the Kaiser medical care system should consist of two hospitals and eight clinic pharmacies, two of which will be physically integrated within the hospitals.
>
> (no paragraph)

[R. 552]

> Projecting the estimated outpatient prescription workload upon the future number of facilities indicates *an average daily workload of approximately 600 outpatient prescriptions per pharmacy.*
>
> (no paragraph)
>
> In addition, rough estimates of future physician distribution patterns among clinics indicates that *the projected workloads may approach 1000 outpatient prescriptions per day in certain clinic pharmacies.* * * *" (emphasis supplied)

Greenlick Kaiser deposition exhibit no. 4-86 estimates that by 1980 Kaiser pharmacies in the Port-

land area will be filling *779,100 prescriptions a year*, and Kaiser is but one of a group of alleged "non-profit" hospitals engaged in retail drug sales in this area.

The second Kaiser hospital referred to in Greenlick exhibit no. 3-215 is under construction, as reported in the November 28, 1972 *Oregon Journal* under the headline of $6.8 Million Hospital Goes to Minden Const.":

> "The board of directors of Kaiser Foundation Hospitals Tuesday awarded a contract in excess of $6.8 million to the Minden Construction Co. of Portland for construction of a medical center on Sunnyside Road, North Clackamas County.
>
> "The site is a 29-acre parcel east of Stevens Road, 1,000 feet from the proposed I-205 Sunnyside Road interchange.
>
> "Phase 1 will be a 131-bed general hospital and a 24 physician out-patient clinic including the usual auxiliary services. * * *"

26. The Court has forbidden plaintiff to make discovery concerning the preferential prices, terms and conditions the defendants grant to the alleged "non-profit" hospitals, but not to plaintiff's assignors and other community pharmacies. However, Greenlick deposition exhibit no. 3-96—table 18—contains Kaiser drug acquisition costs for 1968 and 1969 that are subject to measurement against the average prescription acquisition cost reported by defendant Eli Lilly and Company in its

nationally recognized publication, the *Lilly Digest*.

For 1968 the Kaiser acquisition cost was $1.67 per prescription and the *Lilly Digest* cost was $2.25.

For 1969 the Kaiser acquisition cost was $1.48 per prescription and the *Lilly Digest* cost was $2.34.

For 1968, therefore, Kaiser had a 25.8 percent lower drug acquisition cost than the pharmacies whose costs were reported in the *Lilly Digest*.

For 1969 Kaiser had a 36.7 percent lower drug acquisition cost than the pharmacies whose costs were reported in the *Lilly Digest*.

The preferential prices Kaiser receives from the defendants and other drug manufacturers enable Kaiser to compete successfully with plaintiff's assignors and other community pharmacies for the retail drug trade in Multnomah, Clackamas and Washington counties,

* * * * *

(Subscription, jurat and certificate of service omitted in printing)

[R. 555]

United States District Court for the District of Oregon

PLAINTIFF'S RULE 56 AFFIDAVIT RE AUDIT DOCUMENTS OF ALLEGED "NONPROFIT" HOSPITALS

(Filed April 3, 1973; caption omitted in printing)

STATE OF OREGON)
) ss.
County of Multnomah)

I, HENRY KANE, being first duly sworn, depose and say:

1. I am one of the attorneys for plaintiff, am familiar with the records of this case, conducted all of plaintiff's depositions concerning what defendants term the "threshold" issue of drug distribution practices of alleged "nonprofit" hospitals, cross-examined the three witnesses whose depositions were taken by defendants on said issue, have studied the series of documents produced by the various hospital witnesses pursuant to subpoena duces tecum, and am qualified to make this affidavit in opposition to defendants' motion for summary judgment on plaintiff's Second Cause of Action.

2. The subpoena duces tecum served on various witnesses deposed by plaintiff required said witnesses to produce documents pertaining to the hospital's pharmacy operation. Some witnesses were most cooperative in producing documents pursuant to subpoena while others were less than

[R. 556]

fully cooperative. The documents attached to this exhibit contain evidence the plaintiff was unable to obtain from various of the hospital witnesses deposed by plaintiff.

3. The Health Division of the Oregon State Department of Human Resources has in its possession as public records in its Portland office, State Office Building, Portland, Oregon 97201, audit reports and financial statements and letters of transmittal submitted to the Division by various hospitals, including alleged "nonprofit" hospitals whose officials and employees were deposed by plaintiff.

4. On April 2, 1973, Mr. Cornelius C. Bateson, Administrator of the Health Division of the Oregon State Department of Human Resources and custodian of its records, personally granted your affiant permission to examine and copy said documents as public records.

5. On April 2 and 3, 1973, your affiant personally inspected said public records and copied certain of them, which are attached to this affidavit as exhibits to said affidavit.

6. I certify that the documents attached to this affidavit are in context, are true, full and correct copies of the originals in the possession of Mr. Bateson, and contain evidence relevant and material to defendants' motion for summary judgment on plaintiff's Second Cause of Action. As an example, an Emanuel Hospital document reflects "nonpatient" op-

erating revenue for pharmacy of $47,921 in 1969 and $53,129 in 1970. A Willamette Falls Community Hospital document for the year ended July 31, 1971, reflects pharmacy department operating expenses of $114,049. That document permits calculation of net income. However, Errol Hollowell, Administrator of said hospital, said at page 10 of his deposition that he did not have documents called for by his subpoena duces tecum pertaining to net income from pharmacy drug sales. All he produced were documents pertaining to gross income and said he could not estimate—only guess—at net income. Obviously, an expense figure for pharmacy should permit an administrator to make an estimate of net income after deducting expenses from gross income.

[R. 557]

7. The exhibits to this affidavit reflect the fact that the hospital auditors and accountants found that the hospitals earned substantial net income as follows:

Emanuel Hospital:		
	1971	$ 568,550
	1970	411,259
	1969	436,135
Good Samaritan Hospital:		
	1971	717,112
	1970	1,037,480
Holladay Park Hospital:		
	1971	386,480
	1970	383,065
Portland Adventist Hospital:		
	1970	304,907

Portland Osteopathic Hospital:		
	1970	201,497
	1969	38,176
Providence Hospital:		
	1970	909,739
Tuality Community Hospital:		
	1971	160,579.68
	1970	218,454.55
St. Vincent Hospital:		
	1970	1,200,538
Willamette Falls Community Hospital:		
	1971	175,034

8. The above figures cover varying periods and do not reflect the net income of all 14 alleged "non-profit" hospitals. However, two hospitals reported net incomes in excess of $1 million per year and the total of the above-listed figures is *$7,149,005*. The above figures are those computed by the accountants and auditors and while each used various methods of arriving at the figures, my analysis of the reports indicate they are accurate and reflect hospital net profits.

(Subscription, jurat and certificate of service omitted in printing)

[R. 605]

United States District Court for the District of Oregon

PLAINTIFF'S OBJECTION TO "USE" OR "DESTINATION" TESTIMONY RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON SECOND CAUSE OF ACTION, AND BRIEF IN SUPPORT OF OBJECTION

(Filed April 6, 1973; caption omitted in printing)

Without waiving prior objections and pursuant to prior orders of the Court and the Federal Rules of Civil Procedure, plaintiff objects to all deposition testimony and exhibits pertaining in whole or in part to "use" or "destination" of profits from drug sales by the 14 alleged "nonprofit" hospitals, on the ground and for the reason that they are irrelevant and immaterial to the issues raised by plaintiff's Second Cause of Action and defendants' motion for summary judgment on the Second Cause of Action.

DATED: April 5, 1973.

(Subscription omitted in printing)

[R. 606]

BRIEF IN SUPPORT OF MOTION

At issue is whether 14 alleged "nonprofit" hospitals in the Portland area are selling drugs to the public outside of the "for their own use" exemption from the Robinson-Patman Act granted by 15 U.S.C. § 13c.

Two of the 14 hospitals, Kaiser and Willamette Methodist, file federal income tax returns and pay federal income taxes on substantial portions of their

drug sales unrelated to their hospital function. (Scott Kaiser deposition of October 20, 1972, pp. 31-35; Phelan Kaiser deposition; Scott Kaiser deposition exhibit no. 27; Slick Willamette Methodist deposition exhibits numbers 6, 6A, 6B, 6C, 6D and 6E.)

The evidence is uncontradicted that the alleged "nonprofit" hospitals sell drugs to nonhospitalized persons and in the process make huge profits both in dollars and in profit percentages on their drug sales.

Because of the overwhelming evidence of commercial business outside of the 15 U.S.C. § 13c exemption, the defendants at page 7 of their memorandum the startling contradiction of alleged "nonprofit" hospitals earning millions of dollars from their patients and members of the public [sic].

Defendants attempt to do so by misplaced reliance on "use" or "destination" of the drug profits.

Whatever may have been the earlier case law on the subject, the present applicable case law and controlling statutes make irrelevant and immaterial the "use" or "destination" of the profits.

If "use" or "destination" were relevant, there would be no necessity for Kaiser, for example, on advice of counsel, to pay substantial federal income taxes since 1968 on its unrelated drug sales.

The Ninth Circuit and general rule, reinforced by the loophole closing amendments of the Tax Reform Act of 1969, P. L. 91-172, make the *source* of the profits, not the "use" or "destination" controlling.

The source is controlling because of public policy considerations.

[R. 607]

Exhibit A to this brief consists of portions of "TAX-EXEMPT FOUNDATIONS AND CHARITABLE TRUSTS: THEIR IMPACT ON OUR ECONOMY," the Chairman's Report to the Select Committee on Small Business, House of Representatives, 87th Congress, December 31, 1962.

The author is the Honorable Wright Patman, Chairman of the House Select Committee on Small Business and co-author of the Robinson-Patman Act.

Exhibit A is submitted to reflect some of the findings of abuse of their exemption by tax-exempt organizations that culminated in adoption of the Tax Reform Act of 1969. See, for example, the effects of the amendments on:

15 U.S.C. § 511, imposition of tax on unrelated income of charitable, etc., organizations;

15 U.S.C. § 512, unrelated business taxable income;

15 U.S.C. § 513, unrelated trade or business;

15 U.S.C. § 514, unrelated debt-financed income.

2 *U.S. Cong. & Adm. News*, 1969, pp. 2033-34, quoted the Senate report:

> "2. *Tax-exempt Organizations Generally* — Under both versions of the bill, unrelated activities of tax-exempt organizations are restricted. * * * Second, *the unrelated business income tax is extended to virtually all tax-exempt organizations not previously covered*, including churches (after 1975). * * * (emphasis supplied)

1 *Federal Tax Regulations*, 1972, pp. 1369-70, § 1.513-1, Definition of unrelated trade or business, states in part:

> "(b) *Trade or business.* The primary objective of adoption of the unrelated business income tax was to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same basis as the non-exempt business endeavors with which they compete. In general, any activity of a section 511 organization which is carried on for the production of income and which otherwise possesses the characteristics required to constitute 'trade or business' within the meaning of section 162—

[R. 608]

> and which, in addition, is not substantially related to the performance of exempt functions—presents sufficient likelihood of unfair competition to be within the policy of the tax.
>
> (no paragraph)
>
> Accordingly, for the purposes of section 513 the term 'trade or business' has the same meaning it has in section 162, and generally includes any activity carried on for the production of income from the sale of goods or performance of services.
>
> * * *
>
> Activities of producing or distributing goods or performing services from which a particular

amount of gross income is derived do not lose identity as trade or business merely because they are carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization.

(no paragraph)

Thus, for example, *the regular sale of pharmaceutical supplies to the general public by a hospital pharmacy does not lose identity as trade or business merely because the pharmacy also furnishes supplies to the hospital and patients of the hospital in accordance with its exempt purposes* or in compliance with the terms of section 513(a)(2). * * *" (emphasis supplied)

At this point it should be noted that under Oregon law the 14 alleged "nonprofit" hospitals could perform drug distribution activities within the hospital to their patients *without* a pharmacy.

ORS 689.170, relating to the application of ORS Chapter 689 (pharmacy) to hospital pharmacies and drug rooms, provides that a hospital may operate with the "drug room" under the supervision of a consulting pharmacist:

"(1) In a hospital having a pharmacy and employing a pharmacist, the pharmacy and pharmacist are subject to the requirements of this chapter. A hospital which does not have a pharmacy must have a drug room. In a hospital having a drug room as may be authorized by rule of the State Board of Health, *the drug room is not subject to the requirements of this chapter relating to pharmacies.* However, a drug room must be supervised by a consulting pharmacist. * * *" (emphasis supplied)

[R. 609]

A hospital drug room under ORS 689.170 dispenses drug orders to inpatients without a prescription because a physician's hospital order is sufficient.

However, the 14 alleged "nonprofit" hospitals operate licensed pharmacies, not ORS 689.170 drug rooms. A major reason is that these hospitals sell prescriptions to persons not hospitalized inpatients, hence the prescriptions must be issued by a pharmacist.

The Ninth Circuit in a recent opinion restated its opposition to the "destination" theory of tax exemption: *University Hill Foundation* v. *C.I.R.*, 446 F2d 701 (9th Cir. 1971), cert. den., 405 U.S. 965. In reversing the tax court the Ninth Circuit held that the foundation, which paid its profits to tax-exempt university and which was engaged in business, was *not* entitled to tax exemption.

The Ninth Circuit said at 446 F2d 704:

"* * * This court has consistently adhered to this second, source-of-income approach. * * * Underlying this approach is the judgment that section 101(6) was intended by Congress 'to tax all business income, however destined, unless the company was really not in business at all.' * * *"

The Court noted at 446 F2d 706:

"* * * Several courts of appeals, including this

court, have considered section 101(6) as thus amended in the light of its legislative history. Without exception, they concluded that in amending section 101 the Congress intended to require courts to adopt the source-of-income test previously followed by this circuit, rather than the destination-of-income test that had been followed in other circuits. * * *"

University Hill Foundation dealt with a so-called "feeder" organization, but the rationale applies, it is submitted, to all trade and business activities of tax-exempt groups under the Tax Reform Act of 1969 and the relevant Internal Revenue Service regulations.

Also see *Bear Gulch Water Co.* v. *C.I.R.*, 116 F2d 975 (9th Cir. 1941) which denied tax exemption to a water corporation entirely owned by the Regents of the University of California.

[R. 610]

People's Educational Camp Society, Inc. v. *C.I.R.*, 331 F2d 923 (2d Cir. 1964) held that the "destination of income" test did not afford income tax exemption to a public welfare corporation which used much of its revenue to improve its ability to compete commercially.

The Second Circuit said of the law adopted in 1950 to close tax-exemption loopholes:

"* * * Moreover, the Congressional purpose behind the 1950 enactment of both the feeder provision now in Section 502 and the unrelated business income amendment now in Section 511 was to prevent organizations with tax exempt status from competing unfairly with ordinary, taxed business entities. * * * we think that the Congressional purpose behind both it and the feeder provision instructs us not to apply the destination test broadly but to deny exempt status to petitioner, an entity which has directed so much of its revenue toward improving its ability to compete as a commercial operation through the accumulation of large surpluses and the expansion of its income producing facilities."

In this connection there is ample evidence in the record, e.g., Scott Kaiser deposition exhibit no. 11, and the constant expansion of Kaiser facilities in the Portland area, that the various alleged "nonprofit" hospitals have used their profits to expand their income-producing facilities.

The 14 alleged "nonprofit" hospitals compete with plaintiff's assignors and other *taxed* community pharmacies. They also compete with *taxed* proprietary hospitals with which they are in competition.

The Second Circuit carefully distinguished a case relied on by defendants, *Debs Memorial Radio Fund* v. *C.I.R.*, 148 F2d 948 (2d Cir. 1945):

"* * * No sizable surpluses were accumulated; in fact, the court noted that up to the end of the period under review the station's operating expenses had exceeded its operating receipts by some $37,000." (148 F2d at 935, fn 14)

[R. 611]

The radio station in *Debs Memorial Radio Fund* operated at a loss before it began selling some commercial advertising time and still operated at a loss after such sales.

In contrast, the alleged "nonprofit" hospitals earn substantial profits and have substantial net worth in excess of all liabilities. See PLAINTIFF'S RULE 56 AFFIDAVIT RE AUDIT DOCUMENTS OF ALLEGED "NONPROFIT" HOSPITALS, executed April 3, 1973.

Also see Exhibit B to this brief, the page from the Emanuel Hospital financial statement listing *"Investment in nonprofit corporations"*:

"The Hospital is a participant in three nonprofit corporations: Metropolitan Hospitals, Inc., Hospital Systems Center and Portland Hospital Service Corporation. The investments in these nonprofit corporations at December 31, 1971 are as follows:

Metropolitan Hospitals, Inc.	$327,263
Hospital Systems Center	12,241
Portland Hospital Service Corporation	9,000
	$348,504

"Metropolitan Hospitals, Inc., was formed by Emanuel and Physicians and Surgeons hospitals to own and operate Gresham Community Hospital and to construct and operate Meridian Park

Hospital. The initial expenses relating to planning and the construction period of the Meridian Park Hospital project are being shared by the two sponsoring hospitals on a fifty-fifty basis. At December 31, 1971, Emanuel Hospital had contributed *$327,263* as its share of these costs.

"The two sponsoring hospitals have also agreed to underwrite any operating deficits during the first three years of Meridian Park Hospital's operation. The estimated cost of the Hospital building and equipment is *$6,500,000*.

* * *

"Portland Hospital Service Corporation was incorporated to operate a joint laundry and linen service to initially serve five Metropolitan Portland hospitals. The estimated cost of the building, equipment and inventory, is *$2,175,000*." (emphasis supplied)

[R. 612]

Exhibit B was quoted, with the dollar amounts underlined, to emphasize that Emanuel and the other alleged "nonprofit" hospitals are Big Business operations engaged in Big Business transactions in competition with the remaining *tax-paying* proprietary hospitals.

Exhibit B refers to purchase of Gresham Community Hospital, but neglects to disclose that Gresham was a tax-paying proprietary hospital prior to its purchase. Gresham Community Hospital has been removed from the Multnomah County tax rolls

and to that extent the purchase with funds generated by tax-free operations has shifted the property tax load to other taxpayers.

Emanuel and other alleged "nonprofit" hospitals use profits generated from their tax-exempt activities to finance commercial-type operations, e.g., Emanuel Hospital's Portland Hospital Service Corporation competes with commercial laundries for laundry business.

Instructive, therefore, is *Louis W. and Maud Hill Family Foundation* v. *United States*, 347 F. Supp. 1225, 1227 (Minn. 1972):

> "The legislative history of §§ 511, 512 and 513 reflects that in enacting these statutes the Congress was attempting to eliminate a source of unfair business competition by placing the unrelated business activities of exempt organizations upon the same tax basis as non-exempt business endeavors with which they competed. Treas. Reg. § 513-1(b).
>
> (no paragraph)
>
> Hearings on the Revenue Act of 1950 revealed that exempt organizations were using their tax-exempt status to purchase ordinary businesses and to pay for them in installments out of subsequent tax exempt earnings, and were expanding existing business operations with tax free profits.
>
> * * *
>
> (no paragraph)
>
> With the enactment of §§ 511, 512 and 513, *charity-owned or charity-operated businesses were*

> *placed on the same tax basis as any active business notwithstanding the income derived therefrom was used for charitable purposes.*" (emphasis supplied)

In other words, "use" or "destination" is irrelevant!

[R. 613]

Before turning to the Oregon and other state cases relevant to the instant objection, plaintiff emphasizes that tax exemption of the 14 alleged "nonprofit" hospitals is *not* before this Court.

What the hospitals do or do not do with their profits from drug sales is irrelevant in this case and in this context.

The reason is that federal law permits a tax-exempt organization to engage in some commercial activity without necessarily losing its tax exemption. At the same time, however, federal law provides that a tax-exempt organization must pay federal income taxes on the profits from the organization's commercial activity. That is why Kaiser pays federal income taxes on its unrelated drug sales.

The latest reported Oregon decision on the subject of the instant objection appears to be *Umatilla County* v. *Sturtevant-City of Pendleton*, — Or —, 94 Adv Sh 749, 495 P2d 287 (March 23, 1972), which affirmed denial of tax exemption on "airport" property used by the city.

In rejecting the city's argument that exemption should be granted because rental income from the property was used to operate the city airport, the Court of Appeals held at 94 Adv Sh 751, 495 P2d 288:

> "Moreover, this argument necessarily embraces a theory of taxation long since rejected by our Supreme Court—that is, the 'destination of income' theory. Simply stated, this theory holds it is the destination of income, not the source thereof which eventually determines the right to exemption. In Bd. Pub., Meth. Church v. State Tax Com., 239 Or. 65, 396 P.2d 212 (1956), the court's opinion reviewed Oregon cases dating back to 1895 which hold that the proper determinant of the right to tax exemption in Oregon law is the *source* of income." (fn omitted) (Emphasis by Court).

Board of Publications of the Methodist Church v. *State Tax Commission*, 239 Or 65, 396 P2d 212 (1964), the Supreme Court held that a nonprofit, church-affiliated corporation which published and sold church publications and other books and magazines, maintained a store like any other commercial book store, and sold other merchandise to the public,

[R. 614]

was not entitled to exemption from corporation excise taxes, although profits were paid to the church.

The Supreme Court held at 239 Or 67:

> "For our purposes we think it is immaterial to what extent its sales may be related to church

> activity or in the furtherance of particular religious beliefs. All of plaintiff's business is for profit. It is commercial. It is of little consequence whether it sells Bibles for a profit or whether it sells pianos or tractors. It is in business to profit. *It is in direct competition with other privately owned publishers and retail stores doing a similar business.*" (emphasis supplied)

The Supreme Court said at 239 Or 69:

> "* * * The competitive, commercial nature of its business precludes exemption to plaintiff."

We find at 239 Or 73:

> "We think it also persuasive that in the only similar state court cases we can find or that have been cited, both almost identical to the instant case, the state courts have considered and refused to follow the federal cases that adopt the destination of income as the test. * * *"

Since the *Board of Publications* decision the federal decisions that adhere to the destination theory of exemption have been rendered irrelevant by the 1969 amendments to the Internal Revenue Code. But in any event, as the Supreme Court noted at 239 Or 70, "* * * the federal rule was not firmly established but was in conflict."

Sutter Hospital of Sacramento v. *City of Sacramento*, 244 P2d 390 (Cal. Sup. Ct. 1952) affirmed the tax liability of an alleged "nonprofit" hospital.

The California Supreme Court said at 244 P2d 393:

"* * * the test indicated by such phrases, as so construed, is not necessarily whether there is or may be a profit but whether the claimant is operated or conducted for the purpose of making a profit; that is,

[R. 615]

whether the charges are fixed with the intention of yielding a surplus over and above operating expenses: * * *"

In the case at bar the evidence is overwhelming that the alleged "nonprofit" hospitals fix their charges for drugs and other services to yield a substantial surplus over and above operating expenses. See PLAINTIFF'S RULE 56 AFFIDAVIT RE AUDIT DOCUMENTS OF ALLEGED "NONPROFIT" HOSPITALS, executed April 3, 1973. For 1970, Good Samaritan Hospital reported net income or profit of $1,037,480 and St. Vincent Hospital reported net income or profit of $1,200,538!

The California Supreme Court distinguished an earlier case in which there was no profit motive and expenses exceeded total revenue:

"* * * The question here involved was not presented there, and we did not intend to imply that property which was designedly and consistently operated for profit, even though the profit was used for exempt (hospital) purposes and not for the purpose of benefiting any individual, would be exempt. * * *" (294 P2d at 394)

The California Supreme Court then held at 294 P2d at 394:

"Here the determinative factor is the operation of plaintiff's property for the admitted purpose of producing a profit in the sense that the operation was one deliberately designed to produce income in excess of all operating costs. The fact that plaintiff has succeeded in producing net earnings is not accidental or allocable to a fortuitous error in judgment in determining the charges made for its services. On the contrary, plaintiff functioned on a sound financial basis in a manner akin to any modern commercial enterprise intent upon producing a profit from its operations. It is argued that the above-indicated construction of the welfare exemption, denying exemption because of the adoption of sound financial practices, will make it difficult, if not impossible, for modern hospitals to plan for expansion and the improvement of facilities for the better service of the public without losing the benefit of the exemption. This argument * * * should be addressed to the Legislature * * *."

[R. 616]

Cleveland Osteopathic Hospital v. *Zangerle*, 91 NW2d 261 (Ohio 1950) affirmed denial of tax exemption to an alleged "nonprofit" hospital that in 1948 made a profit of $111,007 on receipts of $485,532.

The Ohio Supreme Court held at 91 NW2d at 264:

"But where a hospital extends its facilities and services very largely to those who are able to and do pay the established rates for their accom-

modation and *designedly makes a very substantial profit* in so doing, it places itself in the classification of a business enterprise amenable to taxation, notwithstanding that some unfortunate persons without means are cared for free of charge. See 51 American Jurisprudence 607, Section 635. (Emphasis by Court)

* * *

"The bare fact that a hospital devotes the profits it makes from the conduct of its affairs to paying off indebtedness and to improving and enlarging its plant does not of itself place it in the category of a tax exempt charitable institution. *It is the use of the property and not the use of the proceeds derived therefrom which is determinative of the question of tax exemption.* * * *" (emphasis supplied)

—

Oklahoma Tax Commission v. *Sisters of the Sorrowful Mother*, 97 P2d 888 (Okla. 1940) held that the hospital was subject to a state excise tax because it was in competition with other hospitals:

The Oklahoma Supreme Court held at 97 P2d at 893:

> "* * * Full pay patients alone constituted about 56 per cent of the total number of patients. From these patients and those who paid less than full rates, the hospital derived an income considerably more than the total operating expense including the expense incurred by reason of the charity patients and those who paid less than the cost of service. To the extent of the 3,140 patients who paid full rates, plaintiff was clearly

> in competition with the four other hospitals engaged in the same business in the City of Tulsa."

Also see the tax denial case of *Rogers Memorial Sanitarium* v. *Town of Summit*, 279 NW 623 (Wisc.) 1938).

[R. 617]

THE KAISER SITUATION

Defendants' memorandum at page 3 concedes that Bess Kaiser Hospital is a membership as distinct from a fee-for-service hospital.

> "Two types of institutions are involved. The first, which includes 13 of the 14 institutions which plaintiff has investigated, provides inpatient and outpatient services on a fee-for-service basis to patients who are random members of the community, that is, individuals who are not members of a pre-determined group.
>
> (no paragraph)
>
> The second type provides under the Kaiser Permanente Health Care Program (Kaiser) comprehensive inpatient and outpatient services on a prepaid basis, primarily to members who have previously elected to obtain all or most of their health care needs from the Kaiser program." (Def. mem. 3, lines 20-29)

Defendants also state:

> "As described above, Kaiser's members contract with Health Plan for medical services on a prepaid basis. In turn, Health Plan contracts with Hospitals, The Permanente Clinic and PSO to

deliver those services to members (Scott Dep. I, 37)." (Def. mem. 19, lines 28-31)

The mere fact that Health Plan is an alleged "non-profit" corporation is irrelevant. Health Plan, according to plaintiff's investigation, does *not* have a state or federal tax exemption. At the state level, plaintiff has been informed, any contribution to Health Plan would *not* be tax deductible.

Kaiser Health Plan of Oregon is a membership organization, as is Oregon Physicians' Service.

Oregon Physicians' Service v. *State Tax Commission*, 220 Or 487, 349 P2d 831 (1960) held that OPS was subject to taxation.

The Oregon Supreme Court noted at 220 Or at 493:

"Not uncommonly, charitable and other non-profit associations compete actively with private business. To the extent that a charitable corporation is relieved of the tax burden it gains a competitive advantage. To the extent that such tax

[R. 618]

tax relief is not based on reasonable classification for sound public ends it is a denial of equal protection of its laws. Strict construction of exemption statutes thus with us has constitutional overtones. * * *"

The Court also noted at 220 Or at 499:

"* * * Oregon Physicians' Service, on the oth-

er hand, entered a field already occupied by privately operated insurance companies, though there may have been features of the private plans to which physicians could properly take exception."

The Court held at 220 Or at 506-07:

"* * * If the 'dominant and controlling' motive of the taxpayer is 'primarily to benefit the taxpayer's membership economically, and only incidentally to further larger public welfare,' then the exemption must be denied. * * * The group benefited may be large or small, definite or indefinite in number, but in the benefaction some motive of altruism must clearly shine forth.

"That is not the case here. Oregon Physicians' Service is a medical insurance company, and its members can have no motive beyond insuring themselves against the expense of illness. Commendable as that may be, it is a self-regarding purpose. The company is carried on for no other reason. Even if the plaintiff devoted its entire income above expenses to charity, we would be obliged to deny the exemption.

(no paragraph)

For while it is now clearly established that a charity may carry on some commercial business without losing its exemption * * * we think it is equally clear that *an organization which obviously exists only for the benefit of its members can not claim exemption from taxation even though it pays no dividends or devotes its entire profits to charity.* * * *" (emphasis supplied)

The above-quoted *OPS* decision relies on and cites numerous federal decisions relevant to the membership issue.

[R. 619]

Friendsview Manor v. *State Tax Commission*, 247 Or 94, 104, 420 P2d 77, 427 P2d 417 (1967) noted:

> "In *La Societe Francaise, etc.* v. *California Employ. Com.*, 56 Cal App2d 534, 133 P2d 47, cert den 320 US 736, 64 S Ct 35, 88 L ed 426 (1943) the court made the distinction between providing hospital care for others and for one's self. Members of La Societe paid an admission fee and monthly dues into La Societe. If they became ill they received gratis from La Societe medical and hospital benefits. No profit was made; it was an agency of the Community Chest. Nevertheless, the court held it was not a charitable corporation and thus not exempt from the payment of California Unemployment Insurance taxes. The crux of the court's decision was as follows:
>
> > '* * * *The true rule is that when people band together to purchase hospital care in the event of illness, it is a business venture rather than a charitable undertaking, and the beneficiaries thereof do not consider the benefits received to be "charity."* * * *.' (Emphasis added.) 56 Cal App2d at 545-546.
>
> "Similarly, the English courts have found an organization formed by its members to provide hospital care to its members to be noncharitable. Salmon, J., stated: 'Moreover, the object of the members of the society is not to do good to others

[R. 620]

The articles of incorporation of the various Kaiser organizations are, of course, not conclusive as to the "charitable" nature of these organizations.

Oregon Methodist Homes, Inc., Willamette View Manor, Inc. v. *State Tax Commission*, 226 Or. 298, 308, 360 P2d 293 (1961) held:

> "The question as to whether given hospital is a charity is to be determined in the case of an incorporated hospital not only from its powers as but to themselves. This object is not altruistic and is in my judgment not charitable.' *Waterson* v. *Hendon B. C.*, [1959] 2 All E R 760, 764 (QB)."

At this point plaintiff calls attention to the fact that Bess Kaiser Hospital is a "membership" organization affiliated, according to the record, with only one group of physicians, The Permanente Clinic. The Bess Kaiser Hospital, therefore differs from the so-called fee-for-service hospitals, to use defendants' designation, because it serves "members," not general members of the public who may need hospitalization.

Moreover, defendants do not claim that the Bess Kaiser Hospital is a "charitable" hospital or that it admits "charity" patients.

Plaintiff has searched the voluminous record pertaining to Kaiser, but cannot locate any testimony or exhibit that indicates, directly or indirectly, that Bess Kaiser Hospital is "charitable."

defined in its charter, but also from the manner in which it is conducted and such prima facie evidence as its articles may accord can be rebutted by evidence that the corporation has not in fact lived up to its chartered objects. * * *
(no paragraph)
This is a sound and salutory rule. It is one reflecting human experience. Unselfish declarations of intended purpose and promises of future worthy endeavor are many times rendered meaningless by inaction and should give the declarer no preferred status unless ultimately resolved into concrete and tangible reality."

The above principle was applied in denying tax exemption to a hospital service corporation in *United Hospitals Service Ass'n* v. *Fulton County*, 114 SE2d 524 (Ga. 1960).

The similarity between Kaiser Foundation Health Plan of Oregon and the United Hospitals Service Association is striking:

"The plaintiff's petition attaches a copy of the contract or insurance policy which it issues to its members. Not the public, not just the poor and needy, but those and only those whose application is approved by the petitioner are allowed to obtain the benefits covered by the policy.
(no paragraph)
This means that the petitioner has the right to accept applications from those well able to pay for hospital service and to reject the poor and needy. And every policy holder is required to pay premiums whether he requires service or not, and

once he has received the amount of services paid for,

[R. 621]

he must either leave the hospital before he is physically able or look elsewhere for charity to provide such needed services.
(no paragraph)
This brief recital of relevant facts demonstrates (1) that only such hospital services as are paid for are available; (2) such services are not available to the public, but confined entirely to the private individuals whose applications and money have been accepted; (3) the poor and needy may all be denied any such services; and (4) only the amount of service specified in the policy and paid for by the members is given, and after that this institution contributes nothing, and charity, either private or public is the only hope for additionally needed hospital service for those who are unable to pay."

The above-quoted characterization of the health plan is equally applicable to the contractual health service provided, or not provided, by the Kaiser organizations pursuant to various levels of contractual service.

Greenlick Kaiser deposition exhibit no. 4-13 makes clear that the drugs distributed by Kaiser are designed for the membership, for there is no reference to charity patients:

"The drug system of Kaiser Foundation Hos-

pitals, Portland, Oregon, provides both prescription and over-the-counter drugs to the Health Plan membership, for both ambulatory patients (outpatients) and hospitalized patients (inpatients) upon written or verbal prescribing order by Permanente physicians. * * *"

The Kaiser pharmacies also sell drugs to the general public, as admitted by defendants at page 21 of their memorandum:

"As with the fee-for-service hospital pharmacies, the Kaiser pharmacies dispense drugs to nonmembers * * *." (Def. mem. 21, lines 19-20)

Also see:

Hassett v. *Associated Hospital Service Corporation of Massachusetts*, 125 F2d 611 (1942), cert. den. 316 US 672

[R. 622]

Evanston-North Shore Board of Realtors v. *United States*, 320 F2d 375 (Ct. Cl. 1963), cert. den. 376 US 931

Lincoln Memorial Hospital, Inc. v. *Warren*, 235 NE2d 129 (Ohio 1968)

Frisco Employes' Hospital Association v. *State Tax Commission*, 381 SW2d 772 (Mo. 1964)

The preceding four pages of this brief were devoted to the Kaiser situation to prove that the "use" or "destination" test is irrelevant to prescription drug purchases by Kaiser Foundation Health Plan members from Kaiser pharmacies.

Health Plan members have various prescription drug benefits that require or encourage them to purchase their prescription drugs from Kaiser pharmacies.

Greenlick Kaiser deposition exhibit no. 4-44 states:

"Prescription drug orders presented to Kaiser pharmacies by outpatients are priced according to type of Kaiser membership coverage and at a "reduced charge." [sic] Normally the charge must be paid by the patient at the time he receives the prescription. Similarly, non-prescription drugs are available to members at a reduced charge, payable upon receipt of the drug item. * * *"

Greenlick Kaiser deposition exhibit no. 4-45 states:

"As previously indicated, most Health Plan members pay for drug costs on an 'out-of-pocket' basis. However, certain Health Plan member groups through third party agencies have modified the method of payment and the resulting prescription pricing system. The third party agencies have negotiated with the Kaiser Health Plan to provide particular groups with prescriptions under a prepayment mechanism. * * * For example, the most common arrangement is for the member to pay a charge of one dollar for each prescription of a month's supply or less, and for the sponsoring third party agency to pay the balance through premiums. * * *"

In other words, there are various plans under which a member purchases his regular supply of drugs from the Kaiser pharmacies, without reference to whether or not he is an "inpatient" or an "outpatient."

[R. 623]

Additional evidence that the bulk of Health Plan prescriptions have no connection with hospital "outpatient" treatment is found in Greenlick Kaiser deposition exhibit no. 4-67 under the heading of "Redispensing":

> "* * * The request to renew a prescription order may be made by patient appearance or by telephone. If the request is made by patient appearance in the pharmacy the original prescription is retrieved from the prescription files. A determination is then made as to whether or not the prescription is renewable. If renewable, the prescription will enter the dispensing process. If no refills are indicated, the patient is directed to see a physician on duty in the appropriate outpatient clinic department. * * *
>
> "Prescription renewal requests are also commonly made by telephone. * * *"

The above description reflects the fact that refills are filled routinely without the necessity or red tape of the purchaser being an "outpatient" receiving "outpatient" care from the hospital. Indeed, only a fraction of refills are handled in the Kaiser Hospital pharmacy. The bulk of the refills are handled in the clinic pharmacies.

A large but undetermined portion of Kaiser drug purchases, therefore, are made by Health Plan members who are not ambulatory "outpatients" receiving hospital care on an "outpatient" basis.

Thus, in referring to prescriptions dispensed "per physicians' office visit," Greenlick Kaiser deposition exhibit no. 5 states:

> "During 1962 it was decided to reduce the cost of drugs for plan members by lowering the price of all *out-of-hospital* prescriptions written by plan physicians and dispensed in plan pharmacies. * * *" (emphasis supplied)

"Out-of-hospital" prescriptions is an accurate discription, [sic] for the term describes prescriptions issued to Health Plan members without a visit to the Kaiser hospital for "outpatient" care.

The key fact is that Kaiser is selling drugs to the equivalent of "walk-in" customers who are *not* connected with the hospital as a matter of law because Health Plan is *not* a "nonprofit" organization.

[R. 624]

Health Plan is a non-exempt commercial organization that sells prepaid health and drug benefits that are similar to those offered by competing companies, including Lincoln National Life Insurance Company. See Wiggin deposition p. 11.

Health Plan members have no connection with the Kaiser Hospital unless they are hospitalized "inpatients" or receive care as patients carried on the records as "inpatients," e.g., persons receiving treatment in the emergency room.

Otherwise, Health Plan members are members of

the general public when they purchase drugs at preferential prices from Kaiser.

Consequently, Kaiser's drug sales to Health Plan members who are not "inpatients" or "outpatients" are outside of the 15 U.S.C. § 13c exemption from the Robinson-Patman Act. And those sales are more than *de minimus*. [sic] Also see Wiggin deposition exhibit no. 3 et seq., some 2,000 Kaiser prescriptions processed by Lincoln National Life Insurance Company.

We turn now to the cases relied on by defendants concerning "use" or "destination" of profits from drug sales to the public.

Each of defendants' cases is distinguishable.

Defendants read too much into the quoted passage from *Logan Lanes, Inc.* v. *Brunswick Corporation*, 378 F2d 212, 216 (9th Cir. 1967), cert. den. 389 US 898. On its face *Logan Lanes* was decided prior to adoption of the Tax Reform Act of 1969.

All the Ninth Circuit said was that the fact was undisputed that all net income from the bowling alleys were [sic] used to finance student activity proprams or the expansion and improvement of the university.

The passage relied on by defendants is irrelevant, because the test for purposes of the instant motion has nothing to do with the use made of the profits. What is relevant is whether the bowling establishment operated by the university was in competition with the commercial bowling establishment operated by

plaintiff in *Logan Lanes*. The quoted passage was dicta, not a holding.

[R. 625]

Students Book Company v. *Washington Law Book Company*, 222 F2d 49, 50-51, fn. 5 (DCA 1955), cert. den. 350 US 988, held:

> "5. Appellee also argues that, even if its transactions with the campus book stores were sales, they were exempted from the application of the Robinson-Patman Act by virtue of 52 Stat. 446, 15 U.S.C. § 13c, which provides:
>
> 'Nothing in sections 13-13b * * * of this title shall apply to purchases of their supplies for their own use by schools, colleges, universities, and libraries, churches, hospitals, and charitable institutions not operated for profit.'
>
> Although the appellee has sold books to all three of the universities for their own use, *i.e.*, for their libraries, *the transactions here in question were not actually with the universities, but with the self-sustaining campus book stores, and the books sold were not for the use of the universities, but for resale at a profit. The exemption provision is therefore inapplicable to these transactions.*" (emphasis added)

In *Logan Lanes* the bowling equipment was purchased by the university for the use of the university.

In the case at bar the drug sales at issue involve purchases by the hospitals not for their own use within the 15 U.S.C. § 13c exemption, but for sales to the public.

In *Logan Lanes* the university would have purchased the bowling equipment whether or not it allowed members of the public to use its bowling facilities.

In the case at bar, it must be emphasized, the hospitals would *not* have purchased the drugs resold to the public if the drugs were not to be resold to the public. The hospitals purchased a large quantity of drugs, part of which was for resale to the public in competition with plaintiff's assignors and other community pharmacies. The drugs resold to the public outside of the exemption were separate from their drug purchases for their 15 U.S.C. § 13c "own use."

[R. 626]

Community Blood Bank v. *Federal Trade Commission*, 405 F2d 1011 (8th Cir. 1969) is irrelevant because the case merely decided that the Federal Trade Commission lacked jurisdiction.

The Eighth Circuit held at 405 F2d 1022:

"By way of summary, we hold:

"1. That under § 4 the Commission is vested with jurisdiction over nonprofit corporations without shares of capital, which are organized for and actually engaged in business for only

charitable purposes, and do not derive any 'profit' for themselves or their members within the meaning of the word 'profit' as attributed to corporations having shares of capital.

"3. That the corporate petitioners are true nonprofit corporations, not engaged in business for profit for themselves or their members.

"4. *That the Commission lacks jurisdiction over all of the petitioners.*" (emphasis supplied)

The holding was based on the conclusion that "Congress did not intend to bring within the reach of the Commission any and all nonprofit corporations regardless of their purposes and activities." (405 F2d 1018)

A blood bank may be exempt from the jurisdiction of the Federal Trade Commission, but its unrelated income is subject to taxation, according to Rev. Rul. 66-323, Cumulative Bulletin 66-2, Exhibit C to this brief.

The Ruling said at Cum. Bull. 66-2, p. 218:

"The selling of blood and blood components, such as raw serums, to commercial laboratories is business of a kind regularly carried on for profit. Such business is not substantially related to the purposes forming the basis for exemption of the organization. Accordingly, the *selling of blood and blood products to commercial laboratories constitutes the conduct of unrelated trade or business within the meaning of section 513 of the Code and the organization is subject to the tax imposed by section 511 of the Code.*" (emphasis supplied)

[R. 627]

The restricted view of the Federal Trade Commission's jurisdiction in *Community Blood Bank* v. *FTC*, supra, appears to have been eroded by *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 US 233 (1972).

After reviewing prior decisions that overruled earlier restricted interpretations of the Commission's jurisdiction, the Supreme Court held at 405 US 244:

> "Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." (fn omitted)

The Supreme Court then held at 405 US 245:

> "The general conclusion just enunciated requires us to hold that the Court of Appeals erred in its construction of § 5 of the Federal Trade Commission Act. * * *"

Defendants at page 9 of their memorandum impose on the Court when they raise and discuss an irrelevant rule of law: subject to statutory and case law requirements, a nonprofit corporation may use its profits for proper purposes. That rule has nothing to do with the instant motion or defendants' motion for summary judgment on plaintiff's Second Cause of Action.

CONCLUSION

Plaintiff's motion should be granted and the Court should reject as irrelevant and immaterial all deposition testimony and exhibits pertaining in whole or in part to "use" or "destination" of profits from drug sales by the 14 alleged 'nonprofit" hospitals.

* * * * *

(Subscription omitted in printing)

[R. 638]

EXHIBIT C TO PLAINTIFF'S OBJECTION TO "USE" OR "DESTINATION" TESTIMONY

* * * * *

(Also Sections 511, 513; 1.511-2, 1.513-1.)

Rev. Rul. 66-323

> A blood bank organized and operated exclusively for scientific and charitable purposes, to provide a community with permanent facilities for the collection and storage of human blood and blood products and to provide for the public distribution thereof, may be exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954.
>
> Income from the sale by the organization of blood and blood products to commercial laboratories constitutes income from an unrelated trade or business as defined in section 513 of the Code.

Advice has been requested whether a blood bank operated in the manner described below qualifies for

exemption from Federal income tax under section 501 (c)(3) of the Internal Revenue Code of 1954.

The organization was formed to establish and operate permanent facilities for the collection and distribution of human blood and blood products for the benefit of the public and to conduct related research. Its charter provides that no part of the organization's net earnings may inure to the benefit of any private shareholder or individual. In the event of dissolution, its assets are to be distributed to exempt charitable, scientific, or educational organizations to be used for exclusively exempt purposes.

The organization's board of trustees is comprised predominantly of public members who are not otherwise associated with it.

The blood bank was established to help meet the needs of a community. It obtains blood from professional and volunteer donors and supplies blood and blood products to hospitals, including local and Federal government institutions, doctors, clinics, and commercial laboratories. Within the limits of its ability, it supplies blood free for indigent and charity patients. The bank serves as a free repository of blood for a local research foundation in a volunteer program jointly maintained by it and the foundation. It also provides blood to other institutions for research purposes.

Other activities of the organization include (a) collaborating with an exempt organization in a free program of blood typing of volunteer donors; (b)

opening of several blood-drawing stations in the area which it serves; (c) pioneering in the development of a program to help meet the need for fresh blood in connection with the increasing use of open heart surgery as a standard surgical procedure; (d) allocating funds to a blood coagulation research program conducted jointly with an exempt research center; and (e) providing gratuitous services of an educational nature to the community. The organization also sells blood and blood components, such as raw serums, to commercial laboratories.

Although the organization charges those who are able to pay for its services, its charges for blood and blood products are generally less than the prevailing rates charged by commercial blood distributors. Furthermore, it is committed by its charter to use all funds received for its services in excess of operating costs for the accomplishment of its declared charitable purposes, including expansion of its services as required by the community need. Likewise, it is committed to furnish services to any person notwithstanding his inability to pay. Moreover, its trustees are required to review periodically the schedule of charges to insure that they are not higher than is reasonably necessary to enable it to perform its community function.

In carrying out its purposes, the bank has a volunteer blood replacement program which enables recipients of blood to extinguish, in whole or in part, the charges they would otherwise have to pay. With some

of the institutions it serves, replacement of blood is accepted on a two-for-one basis with no service charge. More usual, however, is full payment or replacement of blood on a one-for-one basis and payment of the service charge.

The blood bank's income is derived mainly from the sale of blood products and services to hospitals, doctors, clinics, and commercial laboratories. Its expenditures are for blood purchases, laboratory expenses, wages, administrative expenses, office supplies, delivery expenses, and other miscellaneous operating expenses.

Section 501(c)(3) of the Code provides for the exemption from Federal income tax of organizations organized and operated exclusively for charitable purposes.

[R. 639]

On the basis of the information set forth above, the organization serves a public purpose in a manner which qualifies it for exemption from Federal income tax as a charitable organization under section 501(c)(3) of the Code.

Section 511 of the Code imposes a tax on the unrelated business taxable income of organizations otherwise exempt from tax under section 501(c)(3) of the Code, with certain exceptions not pertinent here. Section 513 of the Code defines the term "unrelated trade or business" as any trade or business the conduct of which is not substantially related (aside from the need

of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its exempt functions.

The selling of blood and blood components, such as raw serums, to commercial laboratories is business of a kind regularly carried on for profit. Such business is not substantially related to the purposes forming the basis for exemption of the organization. Accordingly, the selling of blood and blood products to commercial laboratories constitutes the conduct of unrelated trade or business within the meaning of section 513 of the Code, and the organization is subject to the tax imposed by section 511 of the Code.

An organization which considers itself within the scope of this Revenue Ruling must, in order to establish exemption under section 501(c)(3) of the Code, file an application on Form 1023, Exemption Application, with the District Director of Internal Revenue for the internal revenue district in which is located the principal place of busness or principal office of the organization. See section 1.501(a)-1 of the Income Tax Regulations.

* * * * *

(Certificate of service omitted in printing)

[R. 641]

United States District Court for the District of Oregon

RULE 56 AFFIDAVIT OF STANLEY E. HARTMAN IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION

(Filed April 10, 1973; caption omitted in printing)

STATE OF OREGON)
)ss.
County of Multnomah)

I, STANLEY E. HARTMAN, being first duly sworn, depose and say:

1. I am a registered pharmacist licensed by the State of Oregon, am engaged in the practice of pharmacy as a community pharmacist, am a member of the plaintiff, Portland Retail Druggists Association, Inc., am an officer of one of the assignors herein, have attended various of the drug practices depositions taken by plaintiff, have read and studied defendants' memorandum in support of their motion for summary judgment on the plaintiff's Second Cause of Action, and am competent to make this affidavit concerning the matters stated herein.

2. Pursuant to F.R.Civ.P. Rule 56(e), I make this affidavit in opposition to defendants' motion for partial summary judgment on the plaintiff's Second Cause of Action. It is based on personal knowledge.

3. Based on my knowledge of the practice of pharmacy and my familiarity with the practices of representatives of various of the

[R. 642]

defendants herein, I state that such representatives call at regular intervals on the alleged "nonprofit" hospital pharmacies, make observations concerning the drug practices of said pharmacies, submit oral and written reports of said observations to their superiors, and that said reports contain material evidence relevant to plaintiff's Second Cause of Action that would tend to support said cause of action. Such evidence is in the possession of defendants herein and should be the subject of discovery by plaintiff because it would contradict the disclaimers of various witnesses deposed by the parties concerning the sale or lack of sale of drugs to the general public by alleged "nonprofit" hospitals.

4. The alleged "nonprofit" hospitals are in direct competition with plaintiff's assignors and other community pharmacies, and such direct competition has been noted and acted upon by the Multnomah County Assessor. Exhibit A to this affidavit is Carson deposition exhibit numbers 3 and 3-1, an appraisal report on one of the alleged "nonprofit" hospitals, Gresham Community Hospital. Exhibit 3-1 states:

> "A pharmacy is located adjacent to the main entry. *Investigation revealed* that besides supplying the needs of hospital patients, *the public may make purchases from this pharmacy*. This may be a small volume of business but is in direct competition with taxpaying enterprises on the outside." (emphasis supplied)

Mr. Kermit Carson, Chief Office Deputy, Multnomah County Department of Taxation, testified:

"Q What is Deposition Exhibit 3 and 3-1?

"A This is our work sheet based upon our inspection of the Gresham General Hospital which was done in 1971-1972.

"Q The conclusion reached is that we have some private doctors offices, we have a pharmacy, we have an X-ray room and we have a laboratory in this hospital and the distinction here is that the X-ray room, laboratory room and so forth is accessible to private doctors whether they are using the hospital or not.

[R. 643]

"Q Was the fact that there is a pharmacy there a factor in making a portion of the hospital subject to assessment and taxation?

"A *Yes, it was.*

"Q Is that pharmacy accessible to the doctors in that facility?

"A *It is our understanding that it is, not only in the facility but to anyone in the community wishing to use it.*" (emphasis added) (Carson dep. pp. 8-9)

—

Carson deposition exhibit no. 3-1 reveals that the 343-square foot Gresham Community Hospital pharmacy is on the county tax roll.

Mr. Carson's deposition at pages 5 to 7 confirms that the Bess Kaiser Hospital pharmacy and other portions of the hospital are on the county tax roll.

Carson deposition exhibit no. 2 is a 1972 county field inspection report on the Bess Kaiser Hospital and states in part.

"* * * Areas considered to be not qualified, at the present time, are the Outpatient Clinic on the second floor, *the Pharmacy, which still fills prescriptions for patients from this clinic*, and access to these areas. * * * in re-investigation, it has been found that the areas now used in a non-qualifying manner accounts for 8% of the value of the improvements." (emphasis supplied) (EXHIBIT B)

The decision of the Multnomah County Assessor to tax the pharmacy facilities of Kaiser and Gresham Community hospitals is official recognition of the fact that the two hospitals compete with taxpaying community pharmacies for the retail trade in prescription drugs in Multnomah County.

5. St. Vincent Hospital fills a very sizeable [sic] number of prescriptions for use outside of the hospital. One particular group of patients not previously discussed consists of patients discharged from the hospital who are then immediately enrolled in an extended care facility. Quite frequently these are Medicare beneficiaries who are eligible for all drugs while hospital inpatients. These patients are also eligible for

[R. 644]

drugs in an extended care facility, but the number of days of eligibility for drugs is limited pursuant to a utilization review process. The West Hills Pharmacy, located at 5701 S. W. Multnomah Blvd., Portland, frequently receives filled prescriptions [sic] issued by St. Vincent Hospital to newly discharged patients entering the West Hills Convalescent Center, an extended care facility located at 5701 S. W. Multnomah Blvd., Portland.

There is much defensive-type deposition testimony concerning "take-home" prescriptions—prescriptions issued to inpatients for use following their discharge. The witnesses tend to testify that only a short-term supply of "take-home" drugs are issued, although they concede that they fill the prescription, regardless of the number of days of drug supply ordered.

On January 23, 1973, St. Vincent Hospital issued three prescriptions to a patient as "take-home" drugs for use following his discharge from St. Vincent.

(1) Prescription no. 167037 was for 100 valium 5 mg, a *25-day* supply;

(2) Prescription no. 167038 was for 100 Aldactizide tablets, a *50-day* supply;

(3) Prescription no. 167039 was for 100 dilatin 100 mgm, a *25-day* supply.

On the basis of the above prescriptions, the containers of which are in my personal possession, I state that St. Vincent Hospital sells "take-home" drugs for

use following discharge in excessive quantities and that these sales deprive community pharmacies of drug sales they would otherwise make in the usual and regular course of business. I further state that such "take-home" drug sales have no legitimate connection with the function of the St. Vincent Hospital and are not a convenience to patients so loaded with "take-home prescriptions. Patients are discharged during daylight hours. Following their daylight discharge they are able to purchase drugs from the pharmacy of their choice, directly or indirectly, and many community pharmacies make deliveries, including after-hour deliveries when so requested.

[R. 645]

Therefore "take-home" drug sales by the alleged "nonprofit" hospitals are *not* for the convenience of the discharged patients. They are sold as "take-home" drugs so that the drug charges can be added to the overall hospital bill and paid without question, to the greater profit of the "nonprofit" hospital.

6. On March 9, 1973, St. Vincent Hospital issued the following prescriptions as "take-home" drugs:

(1) Prescription no. 169060, ½ ampule NA Amytal 3¾gr ampule;

(2) Prescription no. 16902, Benadryl 50 mg 1cc.

7. Since St. Vincent Hospital prescriptions are numbered serially it is simple to computate [sic] the number of "take-home" and other prescriptions issued.

St. Vincent Hospital issued a total of 2,025 new "out patient" prescriptions between January 23, 1973 and March 9, 1973—a 45-day period. That figure, incidentally, is higher than the estimate of 1,000 per month given by Mr. Conrad M. McConnell, St. Vincent Hospital Director of Pharmacy. (McConnell dep. pp. 27-28) The average community pharmacy would be happy to fill 2,025 new prescriptions in a 45-day period. That number is not "de minimus!" [sic]

8. Various of the witnesses deposed by the plaintiff admitted that their "nonprofit" hospital pharmacies made prescription drug sales to "walk-in" members of the public and other customers who had no connection with the hospital, but tended to dismiss them as "emergency" sales.

Webster's Dictionary, Unabridged, Second Edition (1964), p. 593 defines "emergency" as follows:

> "a sudden or unexpected occurrence or combination of occurrences demanding prompt action; urgent necessity; * * *"

Most of the situations described by the witnesses are not emergencies. If they were, the person would receive emergncy room treatment as an outpatient. It is not an emergency that a community pharmacy may not be adjacent to the hospital, [sic] especially since many community pharmacies

[R. 646]

are open into the evening hours and their pharmacists will fill after-hour prescriptions. It is common for a community pharmacist to be called late at night to fill an emergency prescription, rush to his pharmacy to fill the prescription, and then personally deliver it to the person for whom the drug was prescribed.

On March 7, 1973, the plaintiff mailed a questionnaire to 50 independent pharmacies in the Portland area and received 32 replies. All 32 had provisions for emergency pharmacy service and 31 said they delivered prescriptions.

In the absence of a true "emergency" such as a person needing a drug immediately there is no justification for attempting to characterize as "emergency" the prescription drug sales the various hospitals make to the general public.

9. In enacting what is now 15 U.S.C. 13c the Congress granted eleemosynary institutions such as hospitals exemption from the Robinson-Patman Act. The exemption is limited, however, to purchases for their own use, and some of the major drug companies recognize and enforce this vital limitation.

Exhibit C to this affidavit is a copy of the "HOSPITAL PRICE AGREEMENT" notice issued by Sandoz, a major drug manufacturer. It states in part:

> "However, these purchasing privileges impose certain obligations on the purchaser and on Sandoz, as defined by Federal law.

"As a result, all products purchased from this Hospital Price List must be *stored and dispensed exclusively within the confines of the purchasing institution* and used exclusively in prescriptions for patients of the institution and for no other purpose.

(no paragraph)

Should the original purchasing institution resell such purchased products to any other users or to resellers of drugs — wholesale, retail, hospital, physician, nursing home, clinic or any other category — Federal law is thereby violated." (Emphasis by Sandoz)

[R. 647]

Exhibit D to this affidavit is a copy of a March 7, 1973 letter to your affiant signed by Governor Tom McCall. It states in part:

> "The University of Oregon Medical School explored the possibility of providing prescription drugs to the private patients of staff physicians.
>
> (no paragraph)
>
> *After their investigation of the administrative and legal requirements, the plan was abandoned.*" (emphasis supplied)

In other words, the State of Oregon recognized that drugs purchased under U.S.C. § 13c were to be used exclusively for hospital patients. A private patient of a staff physician is not a hospital patient.

Exhibit D is offered to reflect the official policy

of the State of Oregon concerning interpretation of the 15 U.S.C. § 13c exemption.

10. Eleemosynary hospitals were granted the 15 U.S.C. § 13c exemption to enable them to provide medical care at the lowest possible cost and it was assumed, naturally, that the savings would be passed on to the patients.

Instead, the plaintiff has established that the various alleged "nonprofit" hospitals have abused the privilege by selling drugs to doctors and employees at or below cost when overhead is taken into account and by overcharging patients and members of the public.

Welfare records I have examined during the past several months establish that various of the alleged "nonprofit" hospitals charge patients more for drugs than the average charge for the same quantity and quality of drugs sold by a community pharmacy and in excess of the maximum prices allowed by a State Welfare Division pursuant to state law and regulation.

Appendix 1 to this affidavit is a bulky publication titled: "PHARMACEUTICAL SERVICES(,) Guide for Public Welfare Medical Assistance Programs(,) BOOK B, SECTION III," with a covering letter dated December 1, 1972, signed by M. R. Arbuckle, Acting Medical Director, Medical Assistance Section, State Public Welfare Division, received April 4, 1973.

[R. 648]

Following page 38 of Appendix 1 is a group of basic drug lists and maximum drug prices, most of which bear the uniform statement:

"THE PRICE TO BE PAID BY THE PUBLIC WELFARE DIVISION FOR ANY DRUG IN THIS SCHEDULE WILL BE BILLED BY THE PHARMACIST AT THE LESSER OF (1) THE CEILING PRICE QUOTED IN THIS SCHEDULE, OR (2) THE USUAL AND CUSTOMARY CHARGE BY THE PHARMACIST TO THE GENERAL PUBLIC.

"THE 'CODE' NUMBER TOGETHER WITH THE 'COLUMN CODE LETTER' IS YOUR FEE SCHEDULE NUMBER FOR BILLING PURPOSES.

"PRICES IN THIS SCHEDULE ARE SUBJECT TO CHANGE."

The Public Welfare Division audits community pharmacies to insure that the community pharmacies charge the state no more than the ceiling price listed in Appendix 1 or the price the pharmacy charges other customers, whichever is lower.

However, the Public Welfare Division does *not* audit hospitals to insure that the "nonprofit" hospitals charge the state no more than the ceiling price listed in Appendix I or the price the pharmacy charges other customers, whichever is lower.

Nor are hospital drug charges to the state or the federal government audited by the HEW Audit Agency of the U. S. Department of Health, Education, and Welfare.

Consequently, the alleged "nonprofit" hospitals charge for drugs sums substantially in excess of the ceiling prices listed in Appendix 1 and even more substantially in excess of the prices charged doctors and employees.

Page 15 of the Howard Steinbach affidavit reviews the record that confirmed that Emanuel Hospital overcharged the state on a welfare prescription. Mr. Fawkes confirmed my earlier affidavit on the point.

[R. 649]

I know of my own personal knowledge as a community pharmacist that the State Public Welfare Division audits community pharmacies to ascertain whether they are complying with the provisions of Appendix 1, which I hereby certify is an official State Public Welfare Division document received by me from said agency. I have been told by state and federal officials that their respective agencies do not audit hospital bills submitted to the State Public Welfare Division and have personally confirmed these disclosures by my personal examination of hospital bills filed by the hospitals as official records of the State Public Welfare Division. I was able to obtain access to said documents by certifying that I would not use them for political purposes.

11. Exhibit F to this affidavit consists of copies

of Providence Hospital billing summaries the hospital submitted to the State Public Division [sic]. They are official records of said state agency. I hereby certify that exhibit documents are exact copies of the originals, subject to the exception that pursuant to state and federal law and regulation, the agency obliterated the names of the welfare recipients to protect their identities. Otherwise, they are true and correct copies.

On patient number 212081 the hospital charged the state $3.95 for 12 Ampicillin 250 mgm when the state ceiling is $2.90. Providence charged $4.25 for 3 Dexamethasone 1.5 mgm when the state ceiling is $1.75. Providence charged $14.25 for 3 Mucomyst 20% when the state ceiling is $9.85. Providence charged $3.15 for 6 Parest 400 mgm when the state ceiling is $1.39.

12. Exhibit G to this affidavit consists of copies of Portland Adventist Hospital billing summaries the hospital submitted to the State Public Welfare Division, and I certify the exhibit is true and correct. Portland Adventist charged $26.95 for 15 Demerol injections. The highest and most expensive form of Demerol (100 mgm in 2 cc. disp. syringes) costs $4.94, according to the 1973 Redbook. The state ceiling is $8.26. Portland Adventist billed $19.25 for 11 doses of Penergan injection 25 mgm. The high Redbook price to the state would be $9.66.

[R. 650]

On serial number RO 3049 of Exhibit D Portland Adventist Hospital billed the State Welfare Division $3.10 for 2 Noctec 7¼ grains. The state ceiling would allow an assignor $2.65 for the same drug.

On serial number RO 3059 of Exhibit D Portland Adventist Hospital billed the State Public Welfare Division $70 for 40 by 40 mg IM Talwin injection. The state ceiling for that drug in that quantity is $22.69. In the same billing we find that Portland Adventist Hospital billed the State Public Welfare Division $5.20 for one eight oz. bottle of Kaon. If an assignor could bill for this drug, he would be allowed $3.69.

13. The above exhibits were analyzed to provide further evidence that the alleged nonprofit hospitals do *not* sell to their patients at the lowest possible cost —the rationale for the 15 U.S.C. § 13c exemption— but sell their drugs far in excess of costs and the state ceilings on drugs paid for by the state through the various welfare programs.

14. Every part of this affidavit is based on my personal knowledge. I personally, for example, obtained from the Multnomah County Department of Taxation computer print-outs that listed the Bess Kaiser Hospital as partly on the Multnomah county tax roll, and this knowledge was confirmed by Mr. Kermit M. Carson during his deposition, which I attended.

I have personal knowledge of the facts set forth on page 4 of this affidavit concerning the West Hills Pharmacy, which is operated by the corporation of which I am the President. The prescriptions listed on page 4 of my affidavit were obtained by me and were in my personal possession until transferred to plaintiff's counsel in connection with the preparation of this affidavit. I have personal knowledge of the prescriptions listed on page 5 of my affidavit. They are unopened and unused and were in my personal possession until transferred to plaintiff's counsel in connection with the preparation of this affidavit.

I affirm that Exhibit C is a true copy of the notice issued by Sandoz.

[R. 651]

15. I certify that each of the exhibits attached to this affidavit are exact, true and complete copies of the originals, except that Appendix 1 is an official state document and not a copy thereof.

16. I certify that Exhibit B to this affidavit is a true and correct copy of the Carson deposition exhibits quoted at pages 2 and 3 of this affidavit. I further certify that Exhibit D is a true and exact copy of the letter written to me by Governor Tom McCall in response to my inquiry, that I received said exhibit through the United States mails and that it is signed by the Governor, and that said exhibit was in my personal possession until I transferred it to plaintiff's counsel in connection with preparation of this affidavit.

17. Defendants have moved to strike various of plaintiff's Rule 56 affidavits, including all documents incorporated by reference in or attached as exhibits to said affidavits. I am personally aware of the contents of the various challenged Rule 56 affidavits, personally assisted in the preparation of various of the affidavits, e.g., analyzed the depositions and exhibits and made reports of my findings and conclusions to plaintiff's counsel, was fully aware of the contents of various of the affidavits before they were executed, and make the following statements under oath on my personal knowledge as to the following challenged affidavits:

(a) PLAINTIFF'S RULE 56 AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION, Henry Kane affidavit executed March 19, 1973.

Mr. Kane was the most knowledgeable person to prepare and execute said affidavit on behalf of plaintiff, which was prepared in consultation with your affiant, Logan Wallace and Howard Steinbach and is to a large extent based on the official trial court file—the depositions and the exhibits to said depositions. The affidavit quotes the Raymond L. Montee affidavits, which defendants have not challenged. On page 20 and 21 [sic] of the March 19, 1973 Kane affidavit are quotations from Wong Providence Hospital deposition exhibits 13 and 14. I certify that I received the originals of said deposition exhibits, that they were in

[R. 652]

my personal possession until transferred to plaintiff's counsel for purposes of the instant case, and I certify that said exhibits are true and complete copies of the originals thereof. I further certify that exhibits A and B to the March 19, 1973 affidavit were taken from documents in my personal possession until transferred to plaintiff's counsel for purposes of the instant case, and I certify that said exhibits are true and complete copies of the original thereof.

(b) RULE 56 AFFIDAVIT OF HOWARD STEINBACH IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION, Howard Steinbach affidavit executed March 29, 1973.

I certify that Exhibit A to the Steinbach affidavit is a true and complete copy of a document prepared by the Oregon State Board of Pharmacy and made available to plaintiff, and that said document was prepared by said agency from the official records of said agency.

I certify that Exhibit B and Exhibit B-1 are accurate representations of the facts set forth therein and that the data on pharmacy closures are taken from the official records of the Oregon State Board of Pharmacy.

I certify that Exhibit C is a true and original official form of the State Public Welfare Division and

that said exhibit was obtained by the plaintiff directly from the State Public Welfare Division. I know of my own personal knowledge that the form designated Exhibit C is used in the regular course of business by the State Public Welfare Division.

DATED: April 9, 1973.

(Subscription, jurat, and certificate of service omitted in printing)

[R. 688]

United States District Court for the District of Oregon

PLAINTIFF'S RULE 56 AFFIDAVIT OF RAYMOND L. MONTEE RE "CHARITABLE" NATURE OF BESS KAISER HOSPITAL, PORTLAND, ORE.

(Filed April 16, 1975; caption omitted in printing)

STATE OF OREGON)
)ss.
County of Multnomah)

I, Raymond L. Montee, being first duly sworn, depose and say:

1. I am the President of R. L. Montee & Associates, specialized services for the professional man, 3924 N. Interstate Ave., Portland, Oregon 97227, and in that capacity was retained by the law firm of Tilbury & Kane to make inquiry to determine whether Bess Kaiser Hospital, Portland, Oregon, admitted non-emergency, "charity" or medically indigent patients for treatment.

2. On April 10, 1973, your affiant and his female operator contacted Mr. Meadack (spelling?), supervisor of admissions at said hospital, and listened courteously to the inquiry of the female operator as to whether the Bess Kaiser Hospital would admit a personal friend who required medical attention. It was made clear that the prospective patient is without insurance, income or personal property and if admitted to the hospital, could not pay for hospital services received.

[R. 689]

3. Mr. Meadack said that if the woman were an emergency case, the Bess Kaiser Hospital, like most other hospitals, would not be likely to turn the patient away.

4. Mr. Meadack then indicated his belief that it was Bess Kaiser Hospital policy to refer this type of non-emergency patient to the Multnomah County Hospital.

5. Mr. Meadack did not commit himself or the hospital as to whether Bess Kaiser Hospital would admit the prospective patient. Instead, he indicated that he would personally inquire of the hospital administrator to find out if they could help or if there was anything that they might be able to do to help this seemingly deserving person.

6. On April 11, 1973, Mr. Meadack telephoned my office as he had promised to do the preceding day and said that hospital policy would not allow the hospital

to admit the prospective patient unless she were an emergency case. In the absence of an emergency, he said, she would be referred to the county welfare office for assistance. He said "their policy could not admit a medically indigent person without being an emergency case."

(Subscription, jurat and certificate of service omitted in printing)

[R. 691]

United States District Court for the District of Oregon

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION

(Filed April 16, 1973; caption omitted in printing)

• • • • •

[R. 696]

THE 'DE MINIMIS' EXCUSE DOES NOT APPLY TO THE MOTION

Whether the defendants have violated the Robinson-Patman Act is not dependent on the extent of the violation. The issue is whether the defendants have violated the statute, not whether the activity complained of is sufficiently large to constitute a violation of the Robinson-Patman Act.

• • • • •

Case-Swayne Co., Inc. v. *Sunkist Growers, Inc.*, supra, held that the Sunkist growers cooperative lost its exemption from the antitrust laws because *15 percent* of the local associations were private corporations or partnerships for profit instead of exempt growers. There was no discussion by the Supreme Court as to whether 15 percent was sufficient; it was assumed as a matter of course.

* * * * *

[R. 699]

In the case at bar there is no provision of the Robinson-Patman Act that limits its operation to any specific minimum volume of interstate commerce, and, of course, defendants have suggested none.

All of the drugs sold by the 14 alleged "nonprofit" hospitals are manufactured outside of the State of Oregon with respect to the defendants herein, hence all of defendants' drugs resold by the 14 alleged "nonprofit" hospitals are in interstate commerce.

* * * * *

[R. 702]

The Court should consider significant that *not one defendant herein has submitted the affidavit of an officer or employee in support of defendants' motion for summary judgment!*

There is a complete absence of such affidavits despite the fact that F.R.Civ.P. Rule 56 contemplates

that the court will consider the affidavits and counter-affidavits of the parties in ruling on motions for summary judgment.

* * * * *

[R. 711]

The evidence is uncontradicted that on two occasions persons were compelled to purchase so-called "take-home" drugs against their wishes, and defendants' memorandum is silent as to that matter.

Allan T. Carlston, 3707 S. E. Cooper, Portland, Oregon, district traffic representative for the Southern Pacific Transportation Company, testified on December 19, 1972, concerning his experience on June 26, 1972 at Emanuel Hospital, one of the 14 alleged "nonprofit" hospitals:

> "Q Will you relate what happened?
>
> "A Well, on or about that date I was informed that my father was released from the hospital so approximately 9 o'clock in the morning I was there to pick him up because the doctor hadn't arrived to sign a release.
>
> "* * * I said to the girl, 'Well, I am in quite a big hurry and would you give me the prescription so that I can take it to our druggist and have it filled close to home?'

[R. 712]

She said, 'No, it would have to be filled by the pharmacist in the hospital' * * *.

* * * * *

"Q Do you recall any other conversation with this young woman you identified as a nurse concerning the drug prescriptions?

"A *No, only that she said it had to be filled with the pharmacy at the hospital.*

"Q Did you ask for the prescriptions so that you could take them with you?

"A Yes, I did.

"Q What did she say, if anything?

"A *She said, no, they had to be filled at the pharmacy at the hospital.* * * *" (emphasis supplied) (Carlston deposition p. 3, lines 22-25; p. 4, lines 1-2, 8-17; p. 6, lines 4-14)

Mrs. Betty Marie Pye, 12601 S. E. Bush, Portland, was a patient at Portland Adventist Hospital when she received a so-called "take-home" prescription despite her expressed wish to have the prescription filled elsewhere:

* * * * *

[R. 713]

* * * * *

The above-noted depositions may help to explain why the various alleged "nonprofit" hospitals fill so many so-called "take-home" prescriptions. They are filled as a matter of hospital policy, regardless of the person's wishes and charged to the patient's hospital bill, not for the "convenience" of the person, but to enable the hospital to make a substantial profit on "take-home" drug sales to a captive market that otherwise would purchase drugs from the hospital's competitors.

* * * * *

[R. 714]

* * * * *

INTERNAL REVENUE SERVICE RULINGS SUPPORT PLAINTIFF

It is elementary that an agency's interpretation of a statute it administers, while not binding, is persuasive.

Exhibit A to this memorandum are true copies of the following Internal Revenue Service rulings relating to hospital drug sales, found in Internal Revenue Service Cumulative Bulletin 1968-2, July 1968:

Rev. Rul. 68-374 — Circumstances in which an exempt hospital derives unrelated business taxable income from the sale of pharmaceu-

tical supplies to the general public.

Rev. Rul. 68-375 — The sale of pharmaceutical supplies by an exempt hospital to private patients of physicians with offices in a hospital-owned medical building constitutes unrelated business.

Rev. Rul. 68-376 — Situations in which persons who purchase pharmaceutical supplies from an exempt hospital are considered "patients" of the hospital for purposes of determining whether the hospital is engaged in unrelated business.

Rev. Rul. 68-374 said of a situation involving a hospital pharmacy open to the public:

[R. 715]

* * * * *

"Furthermore, there is no substantial causal relationship between the achievement of the hospital's exempt purposes and the sale of pharmaceutical supplies to members of the general public who do not otherwise avail themselves of the hospital's medical or diagnostic facilities.

(no paragraph)

Therefore, *this sales activity constitutes the conduct of unrelated trade or business within the meaning of section 513 of the Code.*

* * * * *

"Accordingly, *the income derived by the hospital from the sale of pharmaceutical supplies to the general public constitutes 'unrelated business taxable income' as defined in section 512 of the Code.*" (emphasis supplied)

Two of the alleged "nonprofit" hospitals, Kaiser and Willamette Methodist, pay federal income taxes on their nonpatient drug sales. Kaiser agreed to pay in 1968 on the advice of counsel and therefore Kaiser is to this day paying taxes on drug sales in the Portland area that plaintiff contends are outside of the 15 U.S.C. § 13c exemption.

Rev. Rul. 68-374 also held that nominal drug sales by a hospital pharmacy to patients of doctors, but not patients of the hospital, constitute "unrelated trade or business [sic] as defined in section 513, since they are neither primarily for the convenience of the hospital's patients within the meaning of section 513(a)(2) nor substantially related to the exercise of the hospital's exempt purpose.

In the case at bar the evidence is uncontradicted that one of the 14 alleged "nonprofit hospitals, Gresham Community, has doctor's offices in the hospital. The hospital pharmacy and the doctor's offices

[R. 715]

are on the Multnomah County tax rolls along with the outpatient clinic and pharmacy at Bess Kaiser Hospital.

* * * * *

[R. 717]

The distinction between drugs sold to "outpatients" in connection with hospital treatment and nonpatient drugs outside the "outpatient" definition is made clear in *Harper* v. *Bankers Life & Casualty Company*, 151 SE2d 98 (S.C. 1966), originally cited to the court by defendants.

> "* * * Every patient who has been discharged from a hospital is not necessarily an outpatient of the hospital simply because his condition requires further treatment.
>
> (no paragraph)
>
> *In order to constitute one an outpatient of the hospital, the treatment received must be hospital connected.*" (151 SE2d 100) (emphasis supplied)

* * * Unless the drug sale was made incident to treatment of the purchaser by the hospital, the purchaser is a stranger to the hospital and its tax-exempt purpose. If made incident to outpatient treatment the drug is a "hospital order," not a prescription.

* * * * *

[R. 718]

Exhibit B to this memorandum is a true copy of a letter dated April 9, 1973, to plaintiff's counsel signed by C. H. Mack, Director of the Oregon Department of Revenue, in response to an inquiry as to whether the Kaiser Foundation Health Plan of Oregon, a membership organization, had been granted tax exemption by the Department of Revenue or its predecessor, the State Tax Commission.

Mr. Mack said:

> "We are not permitted under the provisions of ORS 314.835 to furnish the information requested. We can advise that Kaiser Foundation Health Plan of Oregon is not on our list of organizations contributions to which are deductible on Oregon tax returns of the donors."

In other words, Kaiser Foundation Health Plan of Oregon, whose members purchase nonpatient drugs from the Kaiser pharmacies, is not charitable or otherwise tax-exempt as to the State of Oregon.

See *Maynard Hospital, Inc.* v. *C.I.R.*, 52 Tax Court 1006 (1969) involving an alleged "nonprofit" hospital with strictly charitable services of less than one percent of the amount of its charged-for services and which operated a pharmacy for profit. The Tax Court held, *inter alia*, that the hospital was not operated exclusively for charitable purposes, and assessed taxes.

* * * * *

(Subscription omitted in printing)

[R. 721]

EXHIBIT A

Internal Revenue Bulletin, Cumulative Bulletin 1968-2
July 1968

§ 512.]

Circumstances in which an exempt hospital derives unrelated business taxable income from the sale of pharmaceutical supplies to the general public.

SECTION 512—UNRELATED BUSINESS TAXABLE INCOME

26 CFR 1.512(a)-1: Definition. Rev. Rul. 68-374
(Also Sections 501, 513; 1:501(c)(3)-1, 1:513-1.)

Advice has been requested as to the circumstances in which the sale of pharmaceutical supplies to the general public by the pharmacy of a hospital, exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954, results in unrelated business taxable income under section 512 of the Code.

Section 513 of the Code defines the term "unrelated trade or business" as any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profit derived) to the exercise or performance by such organization of its exempt functions.

To the extent relevant here, section 513(a)(2) of

the Code further states that the term "unrelated trade or business" does not include any trade or business which is carried on by an organization described in section 501(c)(3) primarily for the convenience of its patients.

Section 512 of the Code defines the term "unrelated business taxable income" as the income as computed in this section derived by organizations from any unrelated trade or business regularly carried on.

Section 1.513-1(c)(1) of the Income Tax Regulations states that in determining whether trade or business from which a particular amount of gross income derives is "regularly carried on" within the meaning of section 512, regard must be had to the frequency and continuity with which the activities productive of the income are conducted and the manner in which they are pursued.

Section 1.513-1(c)(2)(ii) of the regulations states that in determining whether or not intermittently conducted activities are regularly carried on, the manner of conduct of the activities must be compared with the manner in which commercial activities are normally pursued by non-exempt organizations. In general, exempt organization businesses which are engaged in only discontinuously or periodically will not be considered regularly carried on if they are conducted without the competitive and promotional efforts typical of commercial endeavors.

Section 1.513-1(c)(2)(ii) of the regulations further states that where an organization sells certain

types of goods or services to a particular class of persons in pursuance of its exempt functions "primarily for the convenience" of such persons within the meaning of section 513(a)(2), casual sales in the course of such activity which do not qualify as related to the exempt function involved or as described in section 513(a)(2) will not be treated as regular. On the other hand, where the nonqualifying sales are not merely casual, but are systematically and consistently promoted and carried on by the organization, they meet the section 512 requirement of regularity.

[R. 722]

The application of the principles and requirements set forth in the above sections of the Code and regulations to sales by a hospital pharmacy to members of the general public is illustrated in the two situations set out below.

Situation 1. A hospital exempt from Federal income tax under section 501(c)(3) of the Code maintains a facility on the ground floor of its main building for the sale of pharmaceutical supplies. In addition to prescription drugs, the pharmacy also sells nonprescription drugs and a few personal articles. The primary source of the pharmacy's income is sales to patients of the hospital. See Revenue Ruling 68-376, page 246, of this Bulletin, for illustrative descriptions of persons considered "patients" of a hospital. However, the pharmacy is also open to the general public. A small percentage of its income is from frequent and

continuous sales of prescription and nonprescription drugs to persons who are not patients of the hospital, but who walk in off the streets to make purchases from the pharmacy.

The buyer-seller relationship between these off-street patrons and the hospital pharmacy is not, in and of itself, sufficient to classify such persons as "patients" of the hospital. Therefore, sales to these persons cannot be considered primarily for the convenience of the patients of the hospital within the meaning of section 513(a)(2) of the Code.

Furthermore, there is no substantial causal relationship between the achievement of the hospital's exempt purposes and the sale of pharmaceutical supplies to members of the general public who do not otherwise avail themselves of the hospital's medical or diagnostic facilities. Therefore, this sales activity constitutes the conduct of unrelated trade or business within the meaning of section 513 of the Code.

The hospital pharmacy's facilities are freely available to patients and nonpatients alike. Pharmaceutical sales to the general public are frequent and continuous and are thus regularly carried on within the meaning of section 512 of the Code.

Accordingly, the income derived by the hospital from the sale of pharmaceutical supplies to the general public constitutes "unrelated business taxable income" as defined in section 512 of the Code.

Situation 2. A hospital exempt from the Federal

income tax under section 501(c)(3) of the Code maintains a limited number of consultation and examination rooms that are available to its medical staff for treating their private patients. These rooms are used only when it is mutually convenient for the patient and physician to meet at the hospital. Patients visiting their physicians in these rooms are not patients of the hospital. If, during the course of such visits, the patient receives a prescription from his physician, he may fill it at any pharmacy.

The hospital maintains a pharmacy for the use of its own patients. Sales to non-patients are not ordinarily permitted. However, as a courtesy to its medical staff, the pharmacy will occasionally fill prescriptions written by the physicians for their private patients, but such sales are not promoted by the hospital, do not occur with frequency, and represent only an insignificant portion of the pharmacy's total sales.

Under these circumstances, such sales would constitute unrelated trade or business as defined in section 513, since they are neither primarily for the convenience of the hospital's patients within the meaning of section 513(a)(2) nor substantially related to the exercise or performance of the hospital's exempt purposes. However, in view of the manner in which they are conducted, these nonqualifying sales are considered casual sales within the meaning of section 1.513-1(c)(2)(ii) of the regulations. Income derived from such sales does not constitute income derived from unrelated trade or business that is regularly carried on

and, therefore, does not constitute "unrelated business taxable income" within the meaning of section 512 of the Code.

[R. 723]

• • • regardless of the number of unrelated businesses. When drafting the 1954 Code, Congress intended no substantive changes from section 421(c) of the 1939 Code. See S. Rept. 1622, 83d Cong., 312 (1954).

Accordingly, the organization is entitled to only one $1,000 deduction under section 512(b)(12) of the 1954 Code in computing its unrelated business taxable income regardless of the number of unrelated businesses in which it is engaged.

The sale of pharmaceutical supplies by an exempt hospital to private patients of physicians with offices in a hospital-owned medical building constitutes unrelated business.

SECTION 513.—UNRELATED TRADE OR BUSINESS

26 CFR 1.513-1:Definition of unrelated trade or business. Rev. Rul. 68-375

(Also Section 501; 1.501(c)(3)-1.)

Advice has been requested whether, under the circumstances set forth below, the sale of pharmaceutical supplies by a hospital exempt from Federal income tax under section 501(c)(3) of the Internal Revenue

Code of 1954 is unrelated business within the meaning of section 513 of the Code.

The hospital owns a medical office building located adjacent to the hospital. It leases office space to those members of its medical staff who find it convenient to locate their private practice in proximity to the hospital. The office practice of these physicians is independent of any activities in which they engage as members of the hospital's medical staff. Patients visiting their offices are treated as their private patients. The hospital's governing authority over the treatment of hospital patients by its medical staff does not extend to the services rendered by the physicians in their private office.

The hospital operates a pharmacy in the office building. It is maintained for the convenience of those persons visiting their private physicians in the building. Income of the pharmacy is primarily from the sale of prescription and nonprescription pharmaceutical supplies to the private patients of the physicians practicing in the building.

Section 513 of the Code defines the term "unrelated trade or business" as any trade or business, the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its exempt functions.

To the extent relevant here, section 513(a)(2) of the Code further states that the term "unrelated trade

or business" does not include any trade or business which is carried on by an organization described in section 501(c)(3) primarily for the convenience of its patients.

Section 1.513-1(d)(2) of the Income Tax Regulations states that a trade or business is "related" to exempt purposes only where the conduct of the business activity has a causal relationship to the achievement of an exempt purpose; and is "substantially related" for purposes of section 513 only if the causal relationship is a substantial one.

[R. 724]

Pharmaceutical supplies are purchased from this pharmacy as an incident to the purchaser's visit to his private physician, rather than as an incident to his use of any of the hospital facilities.

The sale of pharmaceutical supplies to these persons cannot therefore be considered a trade or business that is carried on by the hospital primarily for the convenience of its patients within the meaning of section 513(a)(2) of the Code. Furthermore, since these customers are not patients of the hospital, there is no substantial causal relationship between the achievement of the hospital's exempt purposes and the sale of pharmaceutical supplies to them. Therefore, this activity is not substantially related to the exercise or performance of the hospital's exempt functions within the meaning of section 513 of the Code and implementing regulations.

Accordingly, the sale of pharmaceutical supplies to the class of persons and under the circumstances described above constitutes the conduct of unrelated business within the meaning of section 513 of the Code.

Situations in which persons who purchase pharmaceutical supplies from an exempt hospital are considered "patients" of the hospital for purposes of determining whether the hospital is engaged in unrelated business.

26 CFR 1.513-1: Definition of unrelated trade or business. Rev. Rul. 68-376

(Also Section 501; 1.501(c)(3)-1.)

The Internal Revenue Service has been requested to set forth situations in which persons who purchase pharmaceutical supplies from the pharmacy of a hospital exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954 are considered "patients" of the hospital within the meaning of section 513(a)(2) of the Code.

Section 513 of the Code defines the term "unrelated trade or business" as any trade or business the conduct of which is not substantially related (aside from the need of an organization for income or funds or the use it makes of the profits derived) to the exercise or performance by an organization of its exempt functions. However, to the extent relevant here, section 513(a)(2) of the Code further states that such term does not include any trade or business which is

carried on by an organization described in section 501(c)(3) primarily for the convenience of its patients.

In the case of a hospital exempt under section 501(c)(3) of the Code, the sale of pharmaceutical supplies by its pharmacy to persons considered "patients" of the hospital does not constitute unrelated trade or business as defined in section 513 of the Code. See section 1.513-1(c)(2)(ii) of the Income Tax Regulations. Depending upon his relationship with the hospital, a purchaser of pharmaceutical supplies from the pharmacy of a hospital exempt from Federal income tax under section 501(c)(3) of the Code may be considered a "patient" of the hospital as that term is used in section 513(a)(2) of the Code.

Examples of relationships that determine whether a person is a "patient" of a hospital for purposes of section 513(a)(2) of the Code are illustrated in the six situations set out below.

Situation 1—A person admitted to a hospital as an inpatient.

A is admitted to the hospital as an inpatient. He receives bed, meals, diagnostic services, and treatment for his illness. He is a "patient" of the hospital.

Situation 2—A person receiving general or emergency diagnostic, therapeutic, or preventive health services from outpatient facilities of a hospital.

B is taken to the hospital's emergency room for treatment of injuries sustained in an accident. He is treated in the emergency room and discharged, but is told to return to the hospital's outpatient clinic for further treatment. The hospital maintains an outpatient clinic having regularly scheduled hours during which medical services are provided on an outpatient basis. The governing authority of the hospital has full legal responsibility for the conduct of the clinic. *B* visits the clinic, is registered as a patient, and receives medical care. Treatment in either the emergency room or the outpatient clinic is sufficient to make *B* a "patient" of the hospital.

Situation 3—A person directly referred to the hospital's outpatient facilities by his private physician for specific diagnostic or treatment procedures.

C's private physician refers him to the hospital's outpatient diagnostic facilities for a specific diagnostic procedure. The procedure is administered by a hospital-based practitioner affiliated with the hospital. The availability of these diagnostic procedures is an integral part of the services offered by the hospital. *C* is a "patient" of the hospital.

Situation 4—A person refilling a prescription written during the course of his treatment as a patient of the hospital.

D was formerly a patient of the hospital. During his course of treatment the attending staff physician gave *D* a prescription. *D* filled the prescription at the hospital pharmacy, which filed and retained it. After formal discharge as a patient, he finds it convenient to return to the hospital pharmacy to obtain a refill of that prescription. Since the prescription was written in the course of the hospital-patient relationship, *D* is a "patient" of the hospital.

Situation 5—A person receiving medical services as part of a hospital administered home care program.

E receives medical services in his residence. The services are rendered by, and under the supervision of, the professional staff of the hospital as an extension of its inpatient and outpatient care. *E* is a "patient" of the hospital.

Situation 6—A person receiving medical care and services in a hospital-affiliated extended care facility.

F is a patient in an extended care facility qualified to participate in Medicare and other government financed programs. The facility is affiliated with the hospital which, by agreement, is responsible for certain of its professional activities, especially those necessary to qualify the facility for participating in the Medicare program. While a patient in the facility, *F* is under the medical supervision of a mem-

[sic]

ber of the hospital's medical staff and thus is a "patient" of the hospital.

Accordingly, sales of pharmaceutical supplies to the "patients" in each of the situations described do not constitute unrelated trade or business of the hospital within the meaning of section 513 of the Code.

See Revenue Rulings 68-374 and 68-375, pages 242 and 245 of this Bulletin, for other situations involving sales of pharmaceutical supplies by pharmacies operated by hospitals.

(Certificate of service omitted in printing)

[R. 728]

United States District Court for the District of Oregon

SECOND RULE 56 AFFIDAVIT OF STANLEY HARTMAN IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION, RE PREFERENTIAL DRUG PRICES OF LISTED DEFENDANTS

(Filed April 23, 1973; caption omitted in printing)

STATE OF OREGON)
)ss.
County of Multnomah)

I, Stanley Hartman, being first duly sworn, depose and say:

1. I am a registered pharmacist licensed by the State of Oregon, am engaged in the practice of pharmacy as a community pharmacist, am a member of plaintiff, Portland Retail Druggists Association, Inc., am an officer of one of the assignors herein, have attended various of the drug practices depositions taken by plaintiff, have read and studied defendants' memorandum in support of their motion for summary judgment on the plaintiff's Second Cause of Action, am familiar with the drug sale practices of the various defendants as they pertain to community pharmacies, am competent to make this affidavit concerning the matters stated herein, and make this affidavit on my personal knowledge in opposition to defendants' motion for summary judgment on plaintiff's Second Cause of Action pursuant to Rule 56(e) of the Federal Rules of Civil Procedure.

[R. 729]

2. The Court ordered the plaintiff *not* to make inquiry during deposition discovery of chief pharmacists and other officials of alleged "nonprofit" hospitals concerning defendants' preferential prices, terms and conditions received by said hospitals which are not made available to plaintiff's assignors and other Portland-Vancouver area community pharmacies in competition with said hospitals for the retail trade of "walk-in" members of the general public and other nonhospitalized customers.

3. This affidavit is made to fill in part of the missing record material to defendants' motion for summary judgment on plaintiff's Second Cause of Action, although the record will not be complete until plaintiff receives answers to its August 6, 1971 interrogatories to defendants and is allowed to make discovery of evidence in the sole possession of defendants, e.g., diversion of drugs from said hospitals.

4. Exhibit A to this affidavit is a copy of a form letter dated January, 1973, issued by defendant Abbott Laboratories and personally received by your affiant as a community pharmacy of said defendant in the regular course of business.

5. Exhibit A states in part:

> "Thirdly, because of constantly increasing costs of distribution, we find it necessary to raise our minimum prepaid order to $50.00. Orders of less than $50.00 received after February 1, 1973, will be assessed a $2.00 handling charge. * * *"

6. Exhibit B to this affidavit is a series of the published prices, terms and conditions at which defendants Abbott, Bristol, Squibb, the Warner-Chilcott division of defendant Warner-Lambert Pharmaceutical Company and the Ayerst and Wyeth Laboratories divisions of defendant American Home Products Corporation sell drugs to favored hospitals.

7. The price sheets for Erythromycin, Penicillin and Hydrochlorothiazide issued by defendant Abbott Laboratories and set forth on page 1 of Exhibit A state with respect to "MINIMUM ORDER:"

[R. 730]

> "*None;* however, every effort should be made to keep small orders to a minimum." (emphasis supplied)

In other words, Abbott requires the community pharmacy to place a minimum order of $50 or be assessed a $2 handling charge, but accepts orders from hospitals without any minimum requirement.

8. Defendant E. R. Squibb & Sons, Inc. issued a price list dated January, 1973, which was received by your affiant in the regular course of business from said defendant. The Squibb Pharmaceutical Company price list states under "TERMS AND CONDITIONS OF SALE:"

> "* * * On orders of less than $50.00 net from retail accounts, a service charge of $2.00 will be added."

9. However, the Squibb price sheets for Ampicillin, Tetracyline, and Penicillin in Exhibit B to this affidavit all state:

> "MINIMUM ORDER: None; however, every effort should be made to keep small orders to a minimum."

In other words, Squibb has no minimum order requirement for certain hospitals, but requires a community pharmacy to pay a $2 handling charge if the community pharmacy's order is less than $50.

10. After comparing the prices set forth in Exhibit B with the prices set forth in defendants' catalogs in my possession as a community pharmacist, I state that the defendants whose price lists are set forth in Exhibit B sell the listed drugs to certain hospitals for substantially less than said defendants sell drugs of the same designation, quality and quantity to your affiant and other operators of community pharmacies in the Portland area of the State of Oregon.

11. Exhibit B discloses that Abbott Laboratories sells Penicillin V Potassium tablets 125 mg bulk for $1.95 per 100. The price to the community is $5.37. Abbott sells Hydrochlorothiazide 50 mg tablets at $29.50/1000 to certain hospitals. The price to the community pharmacy is $41.18. Similarly, the community pharmacy pays $9.00 for Erythromycin ethyl succinate 200 mg tablets which Exhibit A shows Abbott sells to certain hospitals for $8.55/50.

[R. 731]

12. Exhibit B to this affidavit discloses that defendant Bristol-Myers Company sells Erythromycin 250 mg base Bristamycin $8367-60 [sic] to certain hospitals for $7.25 per 100. The community pharmacy pays $9.48 for the same drug and quantity.

13. Exhibit B to this affidavit discloses that defendant American Home Products Corporation's Ayerst Laboratories Division sells Dicloxacillin 250 mg capsule Veracillin #46-661-81 for $6.27 per 100. The price to the community pharmacy for the same drug and quantity is $21.45 if purchased directly and $23.83 if purchased through a drug wholesaler.

14. Exhibit B to this affidavit discloses that defendant American Home Products Corporation's Wyeth Laboratories Division sells Omnipen #8-55-1 250 mg/5cc 80 ml bottles for $0.79/80cc. The community pharmacy pays $2.26.

15. Exhibit B to this affidavit discloses that defendant American Home Products Corporation's Wyeth Laboratories Division sells Omnipen # 8-315-6 mg vial for $2.50/10. The community pharmacy pays $19.00.

16. Exhibit B to this affidavit discloses that defendant American Home Products Corporation's Wyeth Laboratories Division sells Omnipen #8-315-9 1,000 mg vial for $4.50/10. The community pharmacy pays $26.00.

16. Exhibit B to this affidavit discloses that defendant American Home Products Corporation's Wyeth Laboratories Division sells Equanil 1R481 400 mg tablets for $12.36/500 and Equanil 1P481 400 mg tablets for $24.50/1000 to certain hospitals. The community pharmacy pays $29.50 and$ 58.00, respectively, for the same quantity of said drugs.

17. Exhibit B to this affidavit discloses that defendant American Home Products Corporation's Wyeth Laboratories Division sells Bicillin LA 6000MU Tubex pgh of 10's at $8.75/pkg for one to nine packages and $8/pgh for 10 to 99. The community pharmacy pays $13.46 and $12.08, respectively, for the same quality and quantity of said drug.

18. Exhibit B to this affidavit discloses that defendant American Home Products Corporation's Wyeth Laboratories Division sells Bicillin

[R. 732]

LA 1200 OMU Tubex pkg. of 10's at $15/pkg for one to nine packages and at $14/pkg. for 10 to 99 packages. The community pharmacy pays $23.24 and $20.92, respectively, for the same quality and quantity of said drugs purchased from said defendant. Not available to the community pharmacy are the quantity discounts for said drugs in quantities of 100 or more, although available to certain hospitals.

19. Exhibit B to this affidavit discloses that de-

fendant Squibb also sells drugs to certain hospitals at prices far below those charged to community pharmacies in this area. Listed below at the left is the Squibb drug, the center column lists the Squibb price to certain hospitals, and the column to the right lists the price to the community pharmacy for the same quality and quantity of drug:

Name	Hospital Price	Community Pharmacy Price
Principen-N #9716	$17.40/500	$60.67
Principen-N #9715	3.85/100	12.67
Principen-N #9745	6.50/100	24.83
Principen-N #97451	6.75/100	24.83
Sumycin #6556	13.75/1000	38.50
Sumycin #65546	1.75/100	4.25
Sumycin #7634	3.15/100	8.25
Sumycin #76346	3.15/100	8.25
Sumycin #8156	.42/60 ml	.90
Sumycin #8155	1.98/480 ml	4.95
Penicillin #6346	5.88/50	10.50
Penicillin #67374	6.50/25	22.50
Penicillin #7341	.55/ea	1.80
Penicillin #7353	1.05/ea	3.20
Penicillin #6846	1.99/100	7.05
Penicillin #6485	3.95/100	12.68
Penicillin #6814	.49/bottle	1.30
Penicililn #6824	.69 bottle[sic]	1.68

[R. 733]

20. I certify that Exhibit A to this affidavit is a true and correct copy of the original thereof.

21. I certify that the documents comprising Exhibit B to this affidavit are true and correct copies of the originals thereof except for the portions I have deleted to avoid disclosure at this time of the source of said documents. The original documents comprising Exhibit B are available to the Court for *in camera* inspection.

DATED: April 21, 1973.

(Subscription, jurat and certificate of service omitted in printing)

[R. 751]

United States District Court for the District of Oregon

ORDER

(Filed May 4, 1973; caption omitted in printing)

IT IS ORDERED:

1. Plaintiff's motion, dated December 7, 1972, for an Order that Portland Adventist Hospital, by and through Donald R. Ammon, shall produce, pursuant to the previously served Deposition Subpoena Duces Tecum, documents evidencing the net revenue from the pharmacy operations of said hospital, and shall answer deposition questions pertaining to the net revenue from the pharmacy operations of said hospital, is granted.

2. Plaintiff's motion, dated December 19, 1972, for an Order that Kaiser Foundation Hospitals, by and through its Regional Controller, Robert A. Scott, shall answer deposition questions as to the Kaiser-affiliated organization he deems to be the owner of drugs transferred from the Bess Kaiser Hospital, Portland, Oregon, to pharmacy clinics in the Portland-Vancouver area operated by Permanente Services of Oregon, Inc., an Oregon for profit corporation, is granted.

[R. 752]

3. Plaintiff's motion, dated December 19, 1972, for an Order that Kaiser Foundation Hospitals, by and through its Regional Controller, Robert A. Scott, shall answer deposition questions as to whether Exhibit 28 to his December 14, 1972 deposition is an accurate representation of certain drug labels, is denied.

4. Plaintiff's motion, dated December 28, 1972, for an Order that defendants shall answer PLAINTIFF'S INTERROGATORIES TO DEFENDANTS (FIRST SET), dated August 6, 1971, as amended by PLAINTIFF'S AMENDED INTERROGATORIES TO DEFENDANTS (FIRST SET), dated November 23, 1971, is denied without prejudice to future renewal of said motion.

5. Plaintiff's motion, dated December 28, 1972, for an Order that plaintiff may file and serve its PLAINTIFF'S RULE 34 REQUEST FOR DOCUMENTS, attached to its motion dated October 25, 1972, is denied without prejudice to future renewal of said motion.

DATED this 4 day of May, 1973.

(Subscription omitted in printing)

[R. 754]

United States District Court for the District of Oregon

AFFIDAVIT OF STANLEY HARTMAN

(Filed May 18, 1973)

STATE OF OREGON)
)ss.
County of Multnomah)

I, STANLEY HARTMAN, being first duly sworn, depose and say:

1. I am a registered pharmacist licensed by the State of Oregon, am engaged in the practice of pharmacy as a community pharmacist, am a member of plaintiff, Portland Retail Druggists Association, Inc., am an officer of one of the assignors herein, have attended various of the drug practices depositions taken by plaintiff, have read and studied defendants' memorandum in support of their motion for summary judgment on plaintiff's Second Cause of Action, am familiar with the drug sale practices of the various defendants as they pertain to community pharmacies, am familiar with the prescription drug containers issued by the various hospitals whose chief pharmacists and other officials were deposed by plaintiff, am competent to make this affidavit concerning the matters stated herein, make this affidavit on my own personal knowledge, and make this affidavit pursuant to Rule 56(e) of the Federal Rules of Civil Procedure and pursuant to the desire of the Court for "numbers"

concerning drug practices of alleged "nonprofit" hospitals, and in opposition to defendants' motion for summary judgment on plaintiff's Second Cause of Action.

* * * * *

[R. 755]

* * * * *

7. Between December 26, 1967, when it issued prescription number 335096, and May 8, 1973, when it issued prescriptionn umber 546054, Emanuel Hospital issued *216,958* [sic] *new prescriptions*, plus a substantial but undetermined number of prescription refills. The Emanuel Hospital figure is exceeded by the *231,061 new prescriptions* issued by the Bess Kaiser Hospital alone between July 1, 1970 and April 12, 1973, a much shorter time period. The figures for the Permanente clinics are

[R. 756]

equally impressive in terms of numbers of prescriptions to non-hospitalized purchasers. The Beaverton Permanente Clinic pharmacy competes with my Bel-Aire Pharmacy in Beaverton for the trade and custom of retail drug purchasers in the Beaverton area of Oregon. The Beaverton Permanente Clinic pharmacy issued prescription number BT 41812 on October 8, 1970 and prescription number BT 144889 on April 27, 1973, or a total of *103,077 new prescriptions* during a period of less than three years.

8. Exhibit A to this affidavit also discloses that Providence Hospital issued 49,435 new prescriptions between August 23, 1968 and May 11, 1973.

9. Exhibit A to this affidavit also discloses that Portland Adventist Hospital issued 48,759 new prescriptions between March 29, 1969 and March 16, 1973.

10. Exhibit A to this affidavit also discloses that St. Vincent Hospital issued 38,045 new prescriptions between March 15, 1971 and March 9, 1973, a two-year period.

11. Exhibit A to this affidavit also discloses that Holladay Park Hospital issued 17,803 new prescriptions between February 2, 1971 and February 2, 1973, a two-year period.

12. Exhibit A to this affidavit, however, does *not* reflect sales to physicians by the hospitals for the office use of the physicians.

(Subscription, jurat and certificate of service omitted in printing)

United States District Court for the District of Oregon

THIRD RULE 56 AFFIDAVIT OF HOWARD STEINBACH IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION

(Filed May 23, 1973; caption omitted in printing)

STATE OF OREGON)
) ss.
County of Multnomah)

I, HOWARD STEINBACH, being first duly sworn, depose and say:

1. I make this motion in opposition to defendants' motion for summary judgment on plaintiff's Second Cause of Action.

2. I am a registered pharmacist licensed by the State of Oregon, a partner in the operation of three pharmacies in the metropolitan area of Portland, an assignor in the above-titled cause, have attended various of the drug practices depositions taken by plaintiff, have read and studied defendants' memorandum in support of their motion for summary judgment on plaintiff's Second Cause of Action, am competent to make this affidavit concerning the matters herein, possess personal knowledge concerning each of the matters stated herein, am familiar with the price lists issued by defendant E. R. Squibb & Sons, Inc., and have compared prices listed in said price lists for the comparable 1971 period with invoices issued by said defendant to various hospitals.

3. Listed below are drugs sold in 1971 by defendant E. R. Squibb to hospitals, the price listed on the Squibb invoice to the hospital, and the higher price to the community pharmacy for the same quantity of drug as set forth in the Squibb "PRICE LIST" to community pharmacies dated January 1971:

Drug	Hospital Price	Pharmacy Price
Pentids 300	$ 5.25	$ 6.25
Pentids P 600 A.S.	5.50	8.25
Delestrogen 20 mg/cc	1.22 per dose/ 50 doses	1.50
Noctec 7½ gr	2.00	4.20
Principen 250 mg cap	25.00	91.00
Principen 500 mg cap	9.25	37.25
Principen Powder 12	.60	2.18
Deladuomone 2 cc Unimatic	2.44	2.84
Sumycin Hydrochloride	168.00	180.00

4. The Squibb hospital invoice that lists Delestrogen 20 mg/cc at $1.22 per dose for a 50-dose order also lists 20 doses of the same drug as "BONUS" and makes no charge for the additional 20 doses. Therefore, the net hospital price is 87 cents per dose.

5. The invoice copies quoted in this affidavit are in the possession of plaintiff's counsel and are available for *in camera* inspection by the Court.

(Subscription, jurat and certificate of service omitted in printing)

United States District Court for the District of Oregon

FOURTH RULE 56 AFFIDAVIT OF STANLEY HARTMAN IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S SECOND CAUSE OF ACTION, RE DRUG PRICE OVERCHARGES BY BESS KAISER HOSPITAL, AN ALLEGED "NONPROFIT" HOSPITAL

(Filed May 23, 1973; caption omitted in printing)

STATE OF OREGON)
) ss.
County of Multnomah)

I, STANLEY HARTMAN, being first duly sworn, depose and say:

1. I am a registered pharmacist licensed by the State of Oregon, am engaged in the practice of pharmacy as a community pharmacist, am a member of plaintiff, Portland Retail Druggists Association, Inc., am an officer of one of the assignors herein, have attended various of the drug practices depositions taken by plaintiff, have read and studied defendants' memoranda in support of their motion for summary judgment on plaintiff's Second Cause of Action, am familiar with the drug sale

practices of the various defendants as they pertain to community pharmacies, am competent to make this affidavit concerning the matters stated herein, make this affidavit on my own personal knowledge, certify that each and every exhibit to this affidavit is a true and complete copy of the original thereof, and make this affidavit pursuant to Rule 56(e) of the Federal Rules of Civil Procedure in opposition to defendants' motion for summary judgment on plaintiff's Second Cause of Action.

2. This affidavit supplements the RULE 56 AFFIDAVIT OF HENRY KANE RE BESS KAISER HOSPITAL, AN ALLEGED "NONPROFIT" HOSPITAL, executed April 24, 1973. Exhibit A to the April 24, 1973 Kane affidavit was a copy of a letter to Mr. Kane dated April 23, 1973, signed by T. H. Hammond, Medical Fiscal Supervisor, Medical Assistance Section, Public Welfare Division, Oregon Department of Human Resources, which said in part:

> "*We are advised by the Kaiser Foundation* that except for OEO/Welfare clients, they no longer accept welfare clients as hospital patients. * * *" (emphasis supplied)

3. Bess Kaiser Hospital/Kaiser Foundation appears to have given Mr. Hammond incorrect or incomplete information, for Mr. Hammond's April 23, 1973 letter to Mr. Kane was corrected in a letter to Mr. Kane dated May 1, 1973, which said in part:

> "Our letter of April 23, 1973, was in error.

"The Kaiser Foundation does accept welfare clients as hospital patients who are not OEO/Welfare eligible. This statement is substantiated by a call from Mr. Sam Hufford, Regional Manager for the Kaiser Foundation and our payment records. Substantial payments were made during the later part of April 1973, for non-OEO hospital patients.

"We are sorry that our letter of April 23 as in error [sic], the result of an erroneous conclusion *being drawn from misinformation.*" (emphasis supplied)

4. Exhibit A to this affidavit is a copy of a letter to your affiant dated May 17, 1973, signed by Mr. Hammond, of the Public Welfare Division. Exhibit A states:

"We are enclosing the Kaiser Foundation's hospital and drug billings requested in your letter of May 13, 1973. All identifying information has been removed from these invoices. The remaining detail is public information."

5. The Bess Kaiser Hospital billing summaries forwarded by Mr. Hammond with his May 17, 1973 letter, exhibits B through E to this affidavit, disclose that Bess Kaiser Hospital/Kaiser Foundation Hospitals charges the Public Welfare Division substantially more for drugs than the maximum figure contained in the Oregon Public Welfare Division's Pharmaceutical Services Guide for Public Welfare Medical Assistance, Appendix 1 to my Rule 56 affidavit executed April 9, 1973, and negatives defendants' unsupported contention that Kaiser is "nonprofit."

6. Your affiant and other community pharmacists are required to comply with the state's Pharmaceutical Services Guide, and are audited by the state and federal government to insure compliance. However, exhibits B through E to this affidavit disclose that Kaiser does *not* comply with the state's Pharmaceutical Services Guide, although the Guide is binding on Kaiser and other hospitals.

7. Exhibit B to this affidavit, hospital billing summary RL 2257, discloses that Kaiser charged the Public Welfare Division *$15.75* for 45 Ampicillin capsules. The maximum charge, according to the Guide, is *$9.35* for 50 capsules.

8. Exhibit C to this affidavit, hospital billing summary TV 8179, discloses that Kaiser charged the Public Welfare Division $18 for six Benadryl injections, available to the community pharmacy at $3.60. The maximum charge, according to the Guide, is *$6.25*, or about one-third of the Kaiser charge.

9. Exhibit D to this affidavit, hospital billing summary TP 3897, discloses that Kaiser charged the Public Welfare Division *$164* for 41 cc. of Talwin. The maximum charge, according to the Guide, is *$19.06*, or *one-eighth* the sum charged by Kaiser.

10. Exhibit E to this affidavit, hospital billing summary NF 8814,

[R. 811]

discloses that Kaiser charged the Public Welfare Division *$52* for 13 doses of Klor Vess, a routine potassium and chloride supplement the Guide does *not* authorize for reimbursement, and *$2.10* for *six* Coumadin tablets. The maximum charge, according to the Guide, is *$1.80* for *12* Coumadin tablets.

(Subscription, jurat and certificate of service omitted in printing)

[R. 830]

United States District Court for the District of Oregon

PLAINTIFF'S OBJECTION TO HOSPITAL WITNESS "ESTIMATES" OF "WALK-IN" DRUG SALES TO MEMBERS OF PUBLIC, AND BRIEF IN SUPPORT OF MOTION

(Filed May 23, 1973; caption omitted in printing)

Pursuant to prior orders of the Court and Rule 56, F.R.Civ.P., plaintiff objects, for purposes of the Court's consideration of defendants' motion for summary judgment on plaintiff's Second Cause of Action, to all testimony by witnesses deposed to date by the parties and deposition exhibits pertaining in whole or in part to "estimates" of hospital sales of prescription drugs to "walk-in" members of the public on the following grounds:

(1) the "estimates" lack foundation;

(2) the "estimates" are contrary to the evidence;

(3) the "estimates" are irrelevant because the existence of such sales, not their extent, is material.

DATED: May 23, 1973.

(Subscription omitted in printing)

[R. 831]

BRIEF IN SUPPORT OF OBJECTION

Defendants' memoranda in support of their summary judgment motion attempt to minimize "walk-in" and other nonpatient drug sales by the 14 alleged "nonprofit" hospitals.

Defendants do so by misplaced reliance on self-serving "estimates" given without proper foundation by hostile hospital witnesses adverse to the plaintiff and its cause of action.

Defendants refer to the testimony objected to by plaintiff in Appendix 2 to defendants' opening memorandum and at page 6, lines 1-11, of their reply memorandum.

The extent of the sales, assuming but not conceding that they are as infrequent as some of the witnesses estimated, is irrelevant. What is relevant is that they took place.

Mr. Terry G. Mack, Administrator of the Gresham Community Hospital, testified at his December 20, 1972, deposition:

> "Q Are members of the general public allowed to purchase drugs from the hospital pharmacy?
> "A *We have no policy prohibiting such; therefore, my answer would be yes.*" (Mack dep. p. 10, lines 11-14) (emphasis supplied)

And the Raymond L. Montee affidavit filed on February 5, 1973 contains uncontradicted evidence

that he was not discouraged when he attempted to, *and succeeded* in his attempts to purchase prescription drugs as a member of the general "walk-in" public from the following "nonprofit" hospitals:

Kaiser Foundation Hospital Pharmacy
St. Vincent Hospital and Medical Center Pharmacy
Dwyer Memorial Hospital Pharmacy
Gresham Community Hospital Pharmacy
Holladay Park Hospital Pharmacy
Portland Adventist Hospital Pharmacy
Willamette Falls Community Hospital Pharmacy
Willamette Methodist Convalescent Center
Woodland Park Hospital Pharmacy

[R. 832]

The various "estimates" given by the hospital witnesses and relied on by defendants in their memoranda are highly objectionable because the estimates were given without a proper foundation. A proper foundation, for example, would have been an analysis of a statistically valid portion of the hospital prescription records for a stated period of time, actual identification of each "walk-in" prescription drug sale during the period, followed by extrapolation to arrive at a valid estimate.

Instead, the "estimates" appear to have been derived without any reference to actual "walk-in" sales and with the purpose of attempting to minimize such sales.

The various estimates are basically objectionable when they are flatly contrary to the record.

Defendants claim, for example, that the estimated number of "walk-in" drug sales by Emanuel Hospital is 12 or 15 per month. That "estimate" appears to fly in the face of the drug containers issued by Emanuel Hospital and filed with the Clerk of the Court on May 18, 1973, with the third Rule 56 affidavit of Stanley Hartman. Mr. Hartman's affidavit said at page 3, lines 26-29:

> "7. Between December 26, 1967, when it issued prescription number 335096, and May 8, 1973, when it issued prescription number 546054, Emanuel Hospital issued *216,958 new prescriptions* [sic], plus a substantial but undetermined number of prescription refills." (emphasis in affidavit)

Defendants' claim that St. Vincent Hospital issued only "1 or 2" walk-in prescription sales per month is less than persuasive when the number of St. Vincent Hospital nonpatient prescription containers on file with the Clerk of the Court are considered. As stated at page 4, lines 15-17, of the third Rule 56 affidavit of Stanley Hartman:

> "10. Exhibit A to this affidavit also discloses that St. Vincent Hospital issued *38,045 new prescriptions* between March 15, 1971 and March 9, 1973, a two-year period." (emphasis supplied)

Assuming, but not conceding, that the relatively small numbers in the "estimates" are relevant to the summary judgment motion, defendants have failed to meet their burden of proof that the "estimates" constitute admissible evidence. On their face the "estimates" appear to have been pulled out of thin air by interested witnesses hostile to plaintiff.

In this context it is significant that various of the law firms representing defendants herein also represent various of the hospitals whose officials were deposed by the parties. The relationship should have enabled those law firms to benefit from their "inside" knowledge of their hospital clients in terms of obtaining the maximum amount of evidence favorable to defendants herein.

Although they had ample opportunity to do so on cross-examination, defendants failed to produce admissible evidence that the "walk-in" sales to the general public were as small, e.g., "1 or 2" per month, as defendants claim in their memoranda.

Plaintiffs affidavits challenge the accuracy of deposition testimony "estimates" and those affidavits remain uncontradicted as of the date of this memorandum.

Although Rule 56 summary judgment motions contemplate the use of affidavits, the defendants have not seen fit to file any personal knowledge affidavits concerning any of the issues of fact raised by plaintiff's

affidavits and other portions of the trial court file.

* * * * *

(Subscription and certificate of service omitted in printing)

ORAL OPINION OF THE DISTRICT COURT, MAY 25, 1973

(Transcript filed October 4, 1973)

[Tr. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., an Oregon non-profit corporation, on behalf of its assignors,

Plaintiff,

vs.

ABBOTT LABORATORIES, an Illinois corporation; AMERICAN HOME PRODUCTS CORPORATION, et al.,

Defendants.

Civil No. 71-543

Portland, Oregon

May 25, 1973

TRANSCRIPT OF PROCEEDINGS

BEFORE:

The Honorable James H. Burns, United States District Court Judge.

(Appearances omitted in printing)

[Tr. 88]

* * * * *

THE COURT: * * *

Despite the suggestion by Mr. Kane that I should make written detailed findings, I do not do so. I cannot; if I took the time to give a written opinion, it would be far beyond the two-month period which Mr. Tilbury mentioned in his letter and my decision would be the same at the end of that time. The grammar would be better, but I intend to rule upon this from the bench at this time.

[Tr. 89]

What is presented, of course, is a question of statutory construction, and I am frequently reminded when I get into statutory construction cases of the statement which Justice Frankfurter made in *Greenwood versus the United States*. In case anybody's interested in the citation, 350 US at 374, who said, I guess with tongue in cheek, "This is a case for applying the canon of construction of the wag who said when the legislative history is doubtful, go to the statute."

I think that's what I'm required to do here, although also ran across a rather intriguing remark made by Justice Holman in the products liability decision that just came out *Markel* (phonetic) *versus Mul How* (phonetic), 196 Oregon Advance Sheet 1739. He said, "In the final analysis, it is the intention of the legislator that governs the lack of legislative history on this particular point indicates that in all probability the legislature never considered the matter which is true of most statutory construction problems or else they would not exist." And I'm called upon to construe the statute here. However, before I indicate to you what my ruling will be, I'm going to respond to the motion to strike portions of the affidavits which have been submitted by plaintiff, and as I read the cases which Mr. Wright's memo, I believe it was Mr. Wright's memo, talks about, he contends that the moving party in a summary judgment motion not only has the right but indeed the duty to move to strike affidavits which it believes are inappropriate in whole or in part, and then there are in effect the equivalent, because by the plaintiff's objection to the so-called statements by witnesses, deposition witnesses, I suppose is sort of the equivalent of that, but again if I were to rule with the detail that Mr. Kane requested on this motion, not only would it take more than two months, it would probably take about two years.

[Tr. 90]

I'd like to just quote from certain affidavits which have been submitted in this case. First from Mr. Tilbury's affidavit filed March 21, 1973 in Paragraph 14 of the affidavit there is a quotation from what Mr. Tilbury swears is the March 21, 1973 Wall Street Journal in which reference is made to a certain SEC proceeding in which apparently Kaiser agreed to the Federal Court injunction which arose from a case in which the SEC brought charges of securities fraud against Kaiser. Kaiser apparently entered into what I

understand would be the equivalent of a consent decree, but the article goes on to say, "Kaiser agreed to a Federal Court injunction without admitting its guilt, without admitting or denying guilt, but the matter still isn't closed. The Royal Canadian Mounted Police are continuing a criminal investigation in a possible violation of British Columbia Securities law."

In Mr. Kane's March 20 affdavit, which is 45 pages and contains a number of attachments by way of exhibits, Exhibit B5 is — well, excuse me, Exhibits B2 through B6, B1 through B6, is a photo copy of the cover of Rampart's Magazine for November, 1970 together with the pages of an article about Kaiser. The article apparently is entitled "Kaiser and the Health Business."

This is a four-page article, and the justification for the affixing of this article to the affidavit appears on Page 43 of the affidavit. The statement is made, "Additional authoritative indicia that the quality or lack of quality in Kaiser medical and drug care is a disputed issue, is Exhibit B to this affidavit. Exhibit before it made a part of the trial court file by this reference is a copy of the covering article by Judith Milgrom

Carnoy titled, "Kaiser: You Pay Your Money and Take Your Chances," published in Rampart's [sic] Magazine November, 1970.

It is sufficient for me to say that to whatever extent that material in the affidavits which have been submitted is relevant, I have taken it into account. To the extent that it is irrelevant, I have not taken it into account, and if that is [not] an adequate finding, I'm sure that there will be appellate advice to that effect forthcoming.

With respect to the defendants—excuse me—with respect to the plaintiff's objection to the so-called estimates, that objection will be treated as overruled.

We come, then, to the central issue in this case which is whether or not the defendants' motion for summary judgment should be granted, and I have no hesitation in saying that I believe that it should and I intend to grant it for the reasons I will indicate briefly.

The vast majority of the drugs which are purchased here and which are used by the hospitals are for the use of the hospital clearly within the meaning of Section 13(c), whether that percentage be 85 or 90 or 95 is of no moment because

even Mr. Kane agrees that the truly in-patient that is the hospitalized bed patient and for practical purposes, the person who receives treatment in the emergency ward, receives the type of treatment for which the section was intended.

This leaves us with the other categories which have been mentioned, and I will simply summarize them. With respect to out-patient treatment whether it be initial or repeated out-patient treatment, I do not believe that it was the Congressional purpose to render inapplicable the statute merely because there was a change in the distribution of health care wherein the degree of out-patient treatment increased over the years since the '30's when this statute was passed.

With respect to the take-home drugs, that is by those who are issued prescriptions by doctors at the time that they are discharged from the hospital where they have normally been in-patient or bed patient, it seems clear to me that that also falls within the clear meaning of the applicability of the statute and that such drugs are indeed for the use of the hospital and thus qualify for the exemption.

With respect to the furnishing of

drugs to employees and staff physicians and other members of the staff, I have some mild degree of question, but not sufficient in my mind, to justify denying the motion for summary judgment. I think this may fairly be said to be for the use of the hospital.

With respect to the walk-in patients, I am persuaded by *Logan Lanes* that even though it might be said that those are not for the use of the hospital, nonetheless, the fact that walk-in sales exist in the amounts indicated by this record would not justify withdrawing from the hospitals the exemption of 13(c).

Furthermore, the fact that there is a dispute apparently as to the exact number of walk-in sales or the exact dollar amount of walk-in sales, would not in my judgment amount to a genuine issue of material facts sufficient to justify denial of the motion for summary judgment.

In short, I believe under *Logan Lanes*, the conduct and the pattern established here by this record is such that the Ninth Circuit would, in fact, conclude that a motion for summary judgment should be granted as to the second cause of action because I believe that the Ninth Circuit would agree with me

that there is no genuine issue of material fact in the second cause of action.

Furthermore, even though I have a little more difficulty in my mind with the Kaiser situation than with the so-called fee for service or so-called non-profit hospitals, that is Emanuel, St. Vincent and the others which have been mentioned, nonetheless, I conclude that it is fairly within the Congressional purpose in that the establishment of satellite pharmacies and satellite clinics throughout the area is not so divorced either conceptually or substantially from the purposes and functions of a hospital, the central hospital institution itself.

I conclude it's not so divorced as to justify withholding from that organization benefits of Section 13(c).

As I say, I have some — I am not as sure in my own mind with respect to the Kaiser situation as I am with respect to the other hospitals which have been mentioned, but if, in fact, there is a policy judgment to be made analyzing and studying the policy that Congress had in mind and how it can best be effectuated at this point in time, 35 years after it's enacted, the Ninth Circuit is a far better able Court and group and body to elaborate

policy and if, in fact, the Kaiser type of plan which as Mr. Clarke has said and as indeed Mr. Kane has agreed is the emerging form, whether or not that takes such a form as to have significant effects on persons such as plaintiff assignors and if, in fact, the action of this Court is destructive of what Congress' policy is or ought to be, then I think that is a policy decision for the Ninth Circuit to make.

I do not believe I am doing a disservice to the Congressional policy by rendering this decision in this fashion.

Learned Hand — at one time, I think it was Learned Hand, spoke of the art of statutory construction as being the proliferation of purpose and necessarily, when a single District Judge in Portland, Oregon sits and tries to proliferate the Congressional purpose of three-and-a-half decades ago, one must approach the task with some degree of diffidence and hesitation. I've given it the best study I can, Gentlemen, and I believe that this decision is consonant with and not in contradiction to the Congressional purpose of enacting 13(c) and so for the reasons I have indicated and bearing in mind that I'm sure my learned brethren

on the Ninth Circuit will forgive the atrocity of my grammar, I grant the motion.

Furthermore, on the assumption that Mr. Kane would move as he did in connection with the earlier ruling of this Court, I am prepared to discuss Section 1292 Sub-B. Do you so move, Mr. Kane?

(Whereupon a brief off-the-record discussion was had.)

MR. KANE: All right, Your Honor, we would be happy to have the Court certify this for an interlocutory appeal, although we are not very happy with the state of the record.

THE COURT: And do you renew the motion which you made last fall at the time I ruled on Causes of Action No. 3 and 4 for a similar certification?

MR. KANE: Yes, we do, Your Honor.

THE COURT: All right. Do you gentlemen desire to be heard in opposition to that motion — Mr. Clarke?

MR. CLARKE: No desire to be heard, Your Honor.

THE COURT: I'm satisfied that this order as well as the corresponding orders issued last fall concerning Count III and Count IV involve

together a controlling question of law as to which there is a substantial ground for difference of opinion and I am furthermore of the opinion strongly that an immediate appeal from this order and the one last fall disposing of Counts III and IV may materially advance the ultimate termination of litigation.

I will so state in writing pursuant to the provisions of 28 USC, 1292, Subsection B when you present such an order and I would assume, Mr. Clarke, that you will follow the issue of policy that we established some time ago.

You should prepare an order, check it with Mr. Kane and be prepared to present it to me in such fashion that you can assure the Court that there is no objection as to form.

MR. CLARKE: Your Honor, one detail. The order last fall on the 3rd and 4th causes of action, there was never a written order entered on it.

THE COURT: Then I would simply incorporate into this order that I do not recall whether that was a motion for summary judgment or —

MR. CLARKE: Well, it was a motion to dismiss.

THE COURT: It was a motion to dismiss.

[Tr. 99]

I see no reason why we shouldn't put all three into this one order, along with the appropriate language from 1292B and then that will complete the matter.

MR. CLARKE: Thank you.

(Reporter's certificate omitted in printing)

[R. 868]

ORDER AND PARTIAL SUMMARY JUDGMENT

(Filed June 22, 1973)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., an Oregon nonprofit corporation, on behalf of its assignors,

Plaintiff,

vs.

ABBOTT LABORATORIES, et al.,

Defendants.

Civil No. 71-543

ORDER AND PARTIAL SUMMARY JUDGMENT

Defendants' motion for an order pursuant to Rule 12 (b) (6), Federal Rules of Civil Procedure, dismissing the third and fourth causes of action of plaintiff's Amended Complaint, came on for hearing before the Court on September 11, 1972, and the Court granted defendants' motion on the ground that the third and fourth causes of action do not state claims upon which relief can be granted.

Defendants' motion pursuant to Rule 56 (b), Federal Rules of Civil Procedure, for summary judgment in their favor on the second cause of action of plaintiff's Amended Complaint, came on for hearing before the Court on May 25, 1973, and the Court granted defendants' motion for the reason that the transactions referred to in the second cause of action are exempt from the Robinson-Patman Act under 15 USC § 13c, there is no genuine issue as to any material fact respecting such exemption and defendants are entitled to judgment on said cause of action as a matter of law.

[Tr. 869]

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED AS FOLLOWS:

1. The third and fourth causes of action of the Amended Complaint are dismissed for failure to state claims upon which relief can be granted.

2. Summary judgment is hereby entered in favor of defendants on the second cause of action of the Amended Complaint.

3. This Court is of the opinion that this order involves controlling questions of law as tc which there is substantial ground for difference of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

Dated this 22 day of June, 1973.

(Subscription omitted in printing)

[R. 871]

United States District Court for the District of Oregon

AFFIDAVIT OF HENRY KANE RE WILLIAM H. RORER, INC. "IN-HOSPITAL USE ONLY" DRUG CONTAINER AND NOTICE OF DEPOSIT OF SAID EXHIBIT WITH THE CLERK OF THE COURT

(Filed July 31, 1973; caption omitted in printing)

STATE OF OREGON)
) ss.
County of Multnomah)

I, Henry Kane, being first duly sworn, depose and say:

I

I am one of the attorneys for the plaintiff in the above-titled cause, am familiar with the files, and make this affidavit to identify an exhibit deposited with the Clerk of the Court on July 31, 1973.

II

Defendant William H. Rorer, Inc. is the manufacturer of a suspension antacid identified by the trademark "CAMALOX" and National Drug Code number NDC 67-180-64, and distributed in a six fluid ounce glass container with a bottle cap bearing the identification "RORER."

III

Exhibit A to this affidavit is a photocopy of an empty container of "CAMALOX" plus a bottle cap bearing the name "RORER" and a pharmacy label reading as follows:

[R. 872]

"WOODLAND PARK HOSPITAL PHARMACY
10300 N. E. Hancock Portland, Ore.
Phone 255-1313 AW 1636046
"No. 64317 Dr. Freiermuth
Eleanor Campbell
Take one teaspoonful every
two hours.
6 20 73h SHAKE WELL
Camalox suspension"

IV

The printed label of the manufacturer, defendant Wiliam H. Rorer, Inc., contains the following printed restriction:

"THIS PACKAGE FOR
IN-HOSPITAL USE ONLY"

V

The above-quoted restriction is evidence of the fact that defendant William H. Rorer, Inc., recognizes that drugs sold to hospitals at prices, terms and conditions not made available to community pharmacies must be consumed *in* the hospital by a hospital patient.

VI

However, Exhibit A confirms that the drug manufactured by defendant William H. Rorer, Inc. was sold for use *outside* the hospital despite the printed restriction quoted in paragraph IV of this affidavit.

VII

On July 31, 1973, I deposited with the Clerk of the Court a sealed cardboard container containing the glass container identified in paragraphs I, III, and IV of this affidavit.

(Subscription, jurat and certificate of service omitted in printing)

[R. 891]

United States District Court for the District of Oregon

PATRICIA NEUBERGER AFFIDAVIT RE EMANUEL HOSPITAL DRUG PRESCRIPTION

(Filed September 4, 1973; caption omitted in printing)

STATE OF OREGON)
) ss.
County of Washington)

I, PATRICIA NEUBERGER, being first duly sworn, depose and say:

1. I am a pharmacist licensed by the State of Oregon, the manager of Riggs Pharmacy, located at 1049 Lloyd Center, Portland, Oregon, and make this affidavit in opposition to defendants' motion for summary judgment on plaintiff's Second Cause of Action.

2. On August 27, 1973, I was on duty in the Riggs Pharmacy when a person identified as Christine Harder presented for refill a prescription issued by Emanuel Hospital in May of 1973, prescription number 545-948 for Ovulen 21, a birth control prescription. The container disclosed that the prescription was for a three-month period.

3. The Emanuel Hospital prescription label disclosed that the price for the Emanuel Hospital prescription for a three-month supply of Ovulen 21 was $4.50.

[R. 892]

4. When I informed her that the charge for a three-month refill would be $6.75, or $2.25 more than the Emanuel Hospital charge, the prospective purchaser said she would not order the prescription, but would obtain the prescription at a later date.

5. The charge of $6.75 for a three-month cycle is the usual and customary charge at the Riggs Pharmacy and is but slightly higher than the ceiling price of $6.40 set by the State Public Welfare Division in its Pharmaceutical Services Guide for Public Welfare Medical Assistance Programs, as reissued December 1, 1970.

6. Based on my experience as a community pharmacist, it is my considered belief that the only reason the purchaser cancelled her order for a refill was that our price was higher than the price charged by Emanuel Hospital.

7. The prescription presented to me had a prescription number and therefore was not a hospital drug order for a hospitalized inpatient.

DATED: August 28, 1973.

(Subscription, jurat and certificate of service omitted in printing)

[R. 894]

United States District Court for the District of Oregon

STANLEY HARTMAN AFFIDAVIT RE DIVERSION OF DRUG

(Filed September 4, 1973; caption omitted in printing)

STATE OF OREGON)
)ss.
County of Washington)

I, STANLEY HARTMAN, being first duly sworn, depose and say:

1. I am a pharmacist licensed by the State of Oregon, an officer of one of plaintiff's assignors, am familiar with the records of this case, make this affidavit on my personal knowledge, and make this affidavit in opposition to defendants' motion for summary judgment on the Second Cause of Action of plaintiff's amended complaint.

2. There has come into my possession a Permanente Services Pharmacy drug container label attached to a bottle bearing a label identifying the manufacturer as defendant Carter-Wallace, Inc. The manufacturer's label states that the bottle contains 100 coated tablets of Miltown (meprobamate) 200 mg. and that the manufacturer is the Wallace Pharmaceuticals Division of Carter, Wallace, [sic] Inc., Cranbury, New Jersey. An identification number on the manufacturer's label is LB-18-3-10.

[R. 895]

3. In the center of the manufacturer's label is a three-fourth inch high letter "H" printed in red.

4. I know of my own personal knowledge that the letter "H" printed on said manufacturer's label means that Carter-Wallace, Inc. has specified that the drug must be used only in the hospital and nowhere else. It is, in effect, an identification that the drug is a "hospital use only" drug.

5. However, the bottle contains a prescription label as follows:

"KEEP OUT OF REACH OF CHILDREN
"SE 94047 DeMond
"ARTHUR CHASE
"one 3 times a day
"5 31 66 H
"Meprobamate 200mg
"PERMANENTE SERVICES PHARMACY
"7705 S. E. Div., PR 7-3311, Portland, Ore., #1211"

6. The prescription label is evidence that despite the restriction printed on the manufacturer's label signifying that the drug was limited to consumption within a hospital, the drug was issued as a prescription which, by definition, excludes hospital consumption. Such use constitutes diversion in violation of the 15 U.S.C. § 13c exemption.

7. The manufacturer's symbol "H" is evidence of defendant Carter-Wallace, Inc.'s recognition that such drugs sold to hospitals at preferential prices not avail-

able to community pharmacies must be used within the hospital.

(Subscription, jurat and certificate of service omitted in printing)

[R. 897]

United States District Court for the District of Oregon

FIFTH RULE 56 AFFIDAVIT OF STANLEY HARTMAN IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION, RE EVIDENCE OF DRUG SALES TO NON-HOSPITALIZED PURCHASERS, AND NOTICE OF DEPOSIT OF PRESCRIPTION DRUG CONTAINERS EXHIBIT WITH CLERK OF THE COURT

(Filed September 10, 1973; caption omitted in printing)

TO: DEFENDANTS AND THEIR LOCAL COUNSEL OF RECORD:

Please take notice that plaintiff on September 10, 1973, deposited with the Clerk of the Court the prescription drug containers identified in Exhibit A to the fifth Rule 56 affidavit of Stanley Hartman attached to this notice.

(Subscription omitted in printing)

[R. 898]

AFFIDAVIT OF STANLEY HARTMAN

STATE OF OREGON)
)ss.
County of Washington)

I, STANLEY HARTMAN, being first duly sworn, depose and say:

1. I am a registered pharmacist licensed by the State of Oregon, am engaged in the practice of pharmacy as a community pharmacist, am a member of plaintiff, Portland Retail Druggists Association, Inc., am an officer of one of the assignors herein, am familiar with the prescription drug containers issued by the pharmacies of the various hospitals whose chief pharmacists and other officials were deposed by plaintiff, am competent to make this affidavit concerning the matters stated herein, make this affidavit on my own personal knowledge, and make this affidavit pursuant to Rule 56(e) of the Federal Rules of Civil Procedure and pursuant to the desire of the Court for "numbers" concerning drug practices of alleged "nonprofit" hospitals, and in opposition to defendants' motion for summary judgment on plaintiff's Second Cause of Action.

2. I certify that Exhibit A to this affidavit is a full, true and accurate representation of the data contained on 101 prescription drug containers received by your affiant and other pharmacists in the regular course of business from persons to whom the contain-

ers and their contents were issued by the hospital and clinic pharmacies listed in Exhibit A hereto. Hospital drug orders, representing drugs issued to hospitalized "inpatients" are *not* listed in Exhibit A to this affidavit. The prescription drug containers listed in Exhibit A each bear a prescription number issued by the pharmacy pursuant to state and federal law, hence the prescriptions were issued to non-hospitalized purchasers.

3. Exhibit A and the prescription drug containers identified in said exhibit are submitted to the Court as additional and physical evidence of drug sales to non-hospitalized purchasers by various alleged "nonprofit" hospitals outside of the 15 U.S.C. § 13c exemption.

[R. 899]

4. A significant number of the prescription drug containers listed in Exhibit A to this affidavit are dated subsequent to the forced termination of plaintiff's limited discovery as to the drug distribution practices of the various alleged "nonprofit" hospitals, e.g., drug sales as recent as recent [sic] as July 17, 1973.

5. Exhibit A to this affidavit lists prescription drug containers issued by the pharmacies of the following hospitals:

(a) Emanuel Hospital (pp. 5-7);

(b) St. Vincent Hospital and Medical Center (pp. 7-10);

(c) Holladay Park Hospital (pp. 10 and 13);

(d) Providence Hospital (pp. 10-11);

(e) Portland Adventist Hospital (pp. 12-13);

(f) Good Samaritan Hospital and Medical Center (pp. 13-14);

(g) Kaiser Foundation Hospital and related clinic pharmacies (pp. 15-17).

6. Analysis of the prescription drug numbers on the containers listed in Exhibit A to this affidavit establishes that each of the above-listed "nonprofit" hospitals issued a substantial number of prescription drugs to non-hospitalized purchasers.

7. Between August 26, 1971, when it issued prescription number 476,766, and July 16, 1973, when it issued prescription number 553,144, a period of some 23 months, Emanuel Hospital issued *76,378 new prescriptions*, plus a substantial but undetermined number of refills.

8. Between August 30, 1971, when it issued prescription number 146,135, and May 22, 1973, when it issued prescription number 172,377, a period of less than two years, St. Vincent Hospital issued *26,242* new prescriptions, plus a substantial but undetermined number of prescription refills.

9. Between August 11, 1970, when it issued prescription number 83,132, and May 31, 1973, when it issued prescription number 109,176, Holladay Park Hospital issued *26,044 new prescriptions* during a period of less than two years.

[R. 900]

10. Exhibit A to this affidavit also discloses that Providence Hospital issued *22,432 new prescriptions* between April 8, 1971 and June 18, 1973.

11. Exhibit A to this affidavit also discloses that Portland Adventist Hospital issued *19,982 new prescriptions* between November 9, 1971 and May 30, 1973.

12. Exhibit A to this affidavit also discloses that Good Samaritan Hospital issued *11,089 new prescriptions* in one year—May 11, 1972 to May 15, 1973.

13. Exhibit A to this affidavit also discloses that the Bess Kaiser Hospital issued *124,575* new prescriptions in less than two years—September 26, 1971 to June 16, 1973, plus a substantial number of prescriptions issued by its affiliated "Permanente Services" pharmacies.

14. Exhibit A to this affidavit, however, does *not* reflect sales to physicians by the hospitals for the office use of the physicians.

(Subscription, jurat and certificate of service omitted in printing)

OPINION OF THE COURT OF APPEALS

(Filed December 26, 1974)

[C.A. Op. 1]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., an Oregon non-profit corporation, on behalf of its assignors and all others similarly situated in the State of Oregon,

Plaintiff-Appellant,

vs.

ABBOTT LABORATORIES, an Illinois corporation; AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation; BRISTOL MYERS COMPANY, a Delaware corporation; CARTER-WALLACE, INC., a Delaware corporation; ELI LILLY AND COMPANY, an Indiana corporation; ENDO LABORATORIES, INC., a Delaware corporation; ORTHO PHARMACEUTICAL CORPORATION, a New Jersey corporation; SQUIBB CORPORATION, a Delaware corporation; E. R. SQUIBB & SONS, INC., a Delaware corporation; A. H. ROBINS COMPANY, INC., a Virginia corporation; WILLIAM H. RORER, INC., a Pennsylvania corporation, and WARNER-LAMBERT PHARMACEUTICAL COMPANY, a Delaware corporation,

Defendants-Appellees.

No. 73-2342

OPINION

On Appeal from the United States District Court
for the District of Oregon

Before: MERRILL and WALLACE, Circuit Judges,
and POWELL, District Judge*

MERRILL, Circuit Judge:

Plaintiff-appellant commenced this action as the assignee of the antitrust claims of more than sixty retail pharmacies engaged in business in the Greater Portland, Oregon, area. Suit was brought against twelve manufacturers of prescription drugs and sought injunctive relief and damages. Appellant's complaint was stated in

* Honorable Charles L. Powell, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

[C.A. Op. 2]

five claims, only the second of which is involved in this appeal.[1] That claim charges that defendant drug manufacturers have violated the Robinson-Patman Act, 15 U.S.C. §§ 13, et seq. (1970),[2] by selling to certain hospitals[3] as prices lower than those charged to the retail pharmacies, appellant's assignors; that the favored hospitals, to some extent at least, then engaged in the resale of the drugs so sold. Defendants-appellees contend that the sales in question are exempt from operation of the Act under 15 U.S.C. § 13c (1970), which reads:

> "Nothing in section 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

After limited discovery and submission of affidavits the district court granted summary judgment in favor of appellees on that claim. The court ruled that each of the fourteen hospitals here involved was "not operated for profit" and that the drugs had been purchased and used for each hospital's "own use." Both of these rulings are assigned as error on this appeal.

We reject appellant's contention that the hospitals did not qualify for exemption (even as to that portion of the purchases which might be "for their own use"), since none of them were "hospitals [or] charitable institutions not operated for profit." It was undisputed

that the hospitals derived substantial profits from the sale of drugs and from time to time enjoyed over-all operating surpluses. However, the existence of such profits or surpluses is not in itself enough to foreclose availability of the exemption. In an integrated medical

center it is to be expected that one department may provide financial support to another. No enterprise such as these could long remain in existence if each department consistently operated at a loss. Nor could it expect long to continue the fortuity of operating each department or the hospital as a whole precisely at the break-even point. There was no allegation that these hospitals (with the possible exception of Kaiser, *see infra*), distributed assets to any interested person, and they could not do so under the terms of their charters. The surpluses were expended in the over-all cost of continuing operations or invested for the improvement of facilities.[4] Accordingly, the district court did not err in ruling that the thirteen hospitals other than Kaiser were "not operated for profit" within the exemption. *Logan Lanes, Inc.* v. *Brunswick Corp.*, 378 F.2d 212, 216 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967).[5]

We believe the district court erred, however, in granting summary judgment as to sales made to Bess Kaiser Hospital. The effect of this hospital's operation as an element of an organization providing comprehensive health services to members for a predetermined fee, and the possibility that some of its physicians, partners in the Permanente Clinic, receive distributions based on net revenues of the Kaiser Foundation Health Plan (to which revenues from drug sales may contribute), appear to present disputed issues of fact which may be material to the hospital's nonprofit status under the exemption. Moreover, in our judgment the proper legal standard for determining whether Bess Kaiser Hospital is "not operated for profit" in these circumstances cannot be developed on the limited record before us. Since we remand the

cause for further proceedings, this issue can more fully be explored below.

The remaining issue is whether purchase of drugs for resale were purchases by the hospitals "for their own use" as that phrase is used in § 13c. With disputed issues of fact resolved in favor of appellant for purposes of the motion for summary judgment, it appears that drugs were distributed by the hospitals under the following circumstances:

1. They were dispensed to the hospital's inpatients in the course of treatment.

2. They were dispensed in the course of treatment to patients at emergency clinics operated by the hospitals.

3. They were provided to departing in-patients as take-home prescriptions.

4. They were provided to persons who had been in-patients as renewals of prescriptions which had first been filled while those persons were in-patients.

5. They were sold for home treatment to out-patients either at hospital pharmacies or at out-patient clinics.

6. They were sold to the hospitals' employees and students for the private use of purchasers.

7. They were sold to hospitals' physicians for their personal or family use or for dispensation in the course of their private practice.

8. They were sold to walk-in customers who were not hospital patients.

The circumstances covered by categories 1 and 2, relating to in-patient and emergency treatment, cover by far the greater part of hospital distribution. There is

no dispute that such dispensing of drugs in the course of treatment in the hospital is the hospitals' own use. It is as to distribution under other circumstances that the parties are in dispute, both factually, and to the frequency of occurrence, and legally, as to whether those uses of the drugs can properly be regarded as the hospitals' own use.

Appellees justify the uses thus made by the hospitals as proper hospital functions. It is asserted that the need of the departing in-patient for take-home

drugs is obvious, and that supplying this need is an essential hospital function; that sales to former patients are in connection with hospital or clinic treatment earlier provided and permit such treatment to continue at home; that sale to employees is pursuant to collective bargaining agreements; that sales to students are an aspect of the hospitals' educational programs; that sales to physicians associated with the hospitals are a perquisite of that association; that sale to walk-in customers is limited to instances when needed drugs cannot be obtained elsewhere; that in all respects a decent regard for the needs of the community and the position of the hospital as a center for the provision of a full range of health services justifies all use made by the hospitals of the drugs sold to them.

We may concede that in these respects distribution by the hospitals can be justified as a proper and useful community service and thus can be regarded as a proper hospital function. It is not, however, the hospital's "own use." Hospital use under § 13c, in our judgment, must be limited to use made by the hospital in dispensing drugs for hospital or clinic treatment of in-patients

or emergency patients. The purpose for which these supplies are purchased — the use to which they are to be put — is their consumption. Section 13c can apply here only to cases in which a hospital can be said to be the consumer. It cannot apply to cases of resale by the hospital to a private consumer.

The hospitals here are (quite properly) accommodating patients, staff and strangers with means whereby they can conveniently purchase for *their* use. The question is not whether the hospitals can continue to provide this useful community service. The question is whether in providing it they may acquire the drugs for such resale at an acquisition price that discriminates against local retail druggists. We hold that they may not.

Logan Lanes, Inc. v. *Brunswick Corp.*, *supra*, does not require the contrary result. There the alleged discriminatory pricing was for bowling alley equipment sold to a state university. The lanes had been acquired for use in connection with the university's physical education program and for recreational use of faculty, staff and students and were operated for those purposes. They were not, however, closed to the general public and some public use (the extent was disputed) was made of them. We held:

> "The primary purpose of the purchases established beyond dispute, was to fulfill the needs of the University in providing bowling facilities for its students, faculty and staff. This being the case, any additional use of the bowling facilities by the general public for a fee, even if such use is substantial, would not establish that the purchases were not made for the use of the University."

378 F.2d at 216. The university's public use was indeed in competition with other local alleys, and it may be questioned whether the university should not, in all fairness, have been compelled to choose between the public use and the favorable exemption. But that is not what the statute requires. It requires only that the "supplies" be acquired by the university for its own use. It does not say that once acquired and put to that use they cannot then be used for any other purpose.

Our case does not involve the acquisition of plant equipment. It involves acquisition of stores of supplies. Plant equipment acquired for a university's own use cannot be segregated from that acquired for use by others, since the same equipment serves both uses. In the case of stores of supplies acquired for consumption the situation is otherwise. Supplies that are resold can readily be segregated from those devoted to a hospital's own use.

In this respect our case is similar to *Students Book Co.* v. *Washington Law Book Co.*, 232 F.2d 49, 50-51 n. 5 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956), where the 13c issue was disposed of in a footnote. The plaintiff, a retail seller of law books, complained of the defendant's sales at lower prices of

books to campus bookstores at law schools. The distinction drawn by the court was similar to the one we draw here — between sales of books to universities for their own use, *i.e.*, for their libraries, and sales to university connected bookstores for resale to students.

Our holding makes it unnecessary for us to deal with the remaining assignment of error.

The judgment is vacated and the cause remanded for further proceedings.

[C.A. Op. Fn. 1]

FOOTNOTES

1. *(Page 2)* The district court granted summary judgment on this claim and noted a controlling question; we accepted the interlocutory appeal under 28 U.S.C. § 1292(b).

2. *(Page 2)* Section 13(a) makes it "unlawful for any person engaged in commerce * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where such commodities are sold for use, consumption, or resale * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

3. *(Page 2)* Appellant designates the following hospitals: Dwyer Memorial Hospital & Medical Center; Emanuel Hospital; Good Samaritan Hospital & Medical Center; Gresham Community Hospital; Holladay Park Hospital; Physicians and Surgeons Hospital; Portland Adventist Hospital; Portland Osteopathic Hospital; Providence Hospital; St. Vincent Hospital & Medical Center; Tuality Community Hospital; Willamette Falls Community Hospital; Willamette Methodist Convalescent Center; Bess Kaiser Hospital.

4. *(Page 3)* Since the exemption of appellees' sales is founded on the purchasers' status as nonprofit hospitals, we need not consider the possible relevance of the parallel exemption for "charitable institutions not operated for profit."

5. *(Page 3)* Since we limit the exemption to purchases by the hospitals "for their own use," we need not decide whether other uses to which the drugs purchased were put could be

regarded as removing drugs purchased for such other uses from the nonprofit exemption. Assuming *arguendo* that some purchases by the hospitals were put to uses outside the nonprofit exemption, the exemption as to drugs purchased for hospital uses would not necessarily be unavailable. *Cf. Young Men's Christian Ass'n* v. *Department of Revenue*, — Or. —, 522 P.2d 464 (1974).

ORDER DENYING PETITION FOR REHEARING

(Filed March 11, 1975)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., an Oregon non-profit corporation, on behalf of its assignors,
Plaintiff-Appellant,

vs.

ABBOTT LABORATORIES, et al.,
Defendants-Appellees.

No. 73-2342

Before: MERRILL and WALLACE, Circuit Judges and POWELL, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing in banc is rejected.

The applications of American Hospital Association and Oregon Association of Hospitals to appear as amici curiae are denied.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(Entered June 23, 1975)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1274

ABBOTT LABORATORIES, et al.,

Petitioners,

v.

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., etc.,

Respondent.

The motion of American Hospital Association for leave to file a brief, as *amicus curiae*, is granted. The petition for a writ of certiorari is granted. Mr. Justice Douglas took no part in the consideration or decision of this motion and petition.